83 - 1573

No.

In the Supreme Court of the United States

October Term, 1983

JOHN P. CALANDRA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

I. Is there a denial of due process, when, after a state court trial, orchestrated by the federal government, the jury finds that petitioner did not commit murder, aid or abet in that murder nor conspire to commit that murder, Petitioner next is tried in Federal Court and charged with the *same two state* predicate [not federal] acts of murder and conspiracy to murder in order to meet the pattern of racketeering activity required under RICO.

II. When the Ohio substantive law provides that murder and conspiracy to murder the same individual merge into one crime for purposes of conviction and sentencing, is there a denial of due process when Petitioner is charged under RICO with violating the Ohio statute covering murder and conspiracy to murder in order to meet the RICO requirement of *two separate predicate acts* necessary to establish a pattern of racketeering activity.

III. Since 18 U.S.C. §1962(d) requires proof that defendant conspire or agree to commit two separate predicate acts in order to establish a pattern of racketeering activity, is there a denial of due process when RICO is given a broad interpretation which permits the two separate predicate acts to be (1) the conspiracy to murder an individual, and (2) the conspiracy to conspire to murder that same individual.

PARTIES BELOW

The caption of this case not containing the names of all parties whose convictions are sought to be reviewed, the following co-defendants' names are disclosed:

(1) James T. Licavoli

(2) Anthony Liberatore

(3) Pasquale Cisternino

(4) Ronald Carabbia

(5) Kenneth Ciarcia

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The petitioner, John P. Calandra, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit entered on January 9, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is in the Appendix. The opinions of the District Court relating to the issues presented for review are in the Appendix.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Sixth Circuit affirmed Petitioner's RICO conviction for a violation of 18 U.S.C §1962(d) on January 9, 1984 and then denied Petitioner's timely-filed Petition for Rehearing on February 17, 1984. Jurisdiction is sought pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are set forth in the Appendix.

5th Amendment, United States Constitution

18 U.S.C. 1961 (RICO)

18 U.S.C. 1962 (RICO)

Ohio Revised Code, Section 2903.01 (Aggravated Murder)

Ohio Revised Code, Section 2903.02 (Murder)

Ohio Revised Code, Section 2923.01 (Conspiracy, Attempt, Complicity)

Ohio Revised Code, Section 2923.03 (Complicity)

STATEMENT OF THE CASE

On October 6, 1977, Daniel Greene was killed by an explosive device as he was entering his car in a parking lot. In connection with that death, Petitioner Calandra together with others was indicted on December 5, 1977 by a state grand jury for (1) aggravated arson (Ohio Revised Code §2902.02); (2) aggravated murder, with specifications (Ohio Revised Code §2903.01); (3) engaging in organized crime (Ohio Revised Code §2923.04); and (4) conspiracy to commit aggravated murder (Ohio Revised Code §2923.01). The conspiracy charges were dismissed early on at the request of the state prosecutor.

Thereafter, on March 7, 1978, additional defendants were indicted by a state grand jury for crimes connected with the death of Daniel Greene. The charges against

the additional defendants were the same as those listed in the previous paragraph, save that their indictment never contained a charge of conspiracy. Calandra was to have been tried with those first indicted, but his trial was severed from the others for reasons of his poor health.

In a state trial, orchestrated by the FBI, Petitioner Calandra was tried jointly with two of the additional defendants in June of 1978. The state trial judge ordered a judgment of acquittal against all three defendants on the charge of organized crime. The jury returned a verdict of guilty against two defendants on the charges of aggravated murder and aggravated arson, but Calandra was found *not* guilty as to all charges.

On January 6, 1978, Calandra was indicted by a federal grand jury with five others (all of whom later would be tried in three separate state trials involving the murder of Greene). The indictment charged violations of 18 U.S.C. §§1962(d) and 1962(c), both sections being part of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, *et seq.* That indictment was voluntarily dismissed by the United States on September 7, 1978, shortly before the scheduled trial date.

A new indictment was returned against all defendants on May 3, 1979. Count I of the indictment recharged the defendants with a §1962(d) RICO conspiracy charge. The other three counts contained new charges, Count II alleging conspiracy under 18 U.S.C. §371 to violate 18 U.S.C. §201(b)(3) (the federal bribery statute), and Counts III and IV charging substantive violations of the same federal bribery statute. As underlying predicate crimes or acts in support of the RICO charge of Count I, the indictment charged that defendants (1) conspired to murder John Nardi; (2) conspired to murder Daniel Greene; (3) mur-

dered and aided and abetted in the murder of Daniel Greene; and (4) bribed an FBI employee on two separate occasions.

On October 18, 1979, the court dismissed Count I (the RICO charge), holding that it failed to state an offense under 18 U.S.C. §1962. On December 21, 1979, Count I was reinstated, but was severed for purposes of trial from Counts II-IV. Trial proceeded in May, 1980, as to Counts II-IV (the bribery charges), and at the termination of the Government's evidence, the district court directed a verdict in favor of two defendants on all counts and for defendant Calandra on Count III. The jury then acquitted Calandra on all remaining counts involving bribery.

Following his acquittal in the 1980 federal court trial, Calandra urged that the Federal Government was estopped from proceeding on Count I of the indictment; further that he would be subject to double jeopardy. The ruling was against Calandra and the trial court reinstituted Count I, the RICO charge.

Although the RICO indictment (18 U.S.C. §1962(d)) originally specified five acts of racketeering as defined in 18 U.S.C. §1961(1)(A), each of which was alleged to constitute a part of the pattern required under 18 U.S.C. 1961(5), by the time of jury submission only two of the predicate acts remained:

(1) conspiring to murder Greene in violation of Ohio Revised Code §2923.01; and

(2) aiding and abetting the murder of Greene in violation of Ohio Revised Code §2903.01.

The District Court charged the jury that petitioner's culpability should be measured as that of an aider and abettor, in view of the fact that there was neither alle-

gation nor proof of direct participation in the murder, thereby invoking the complicity law of Ohio, O.R.C. §2923.03.

The trial terminated in a finding of guilty against all six defendants, petitioner Calandra included.

Petitioner's conviction thus presents the legal anomaly of a man found innocent of every substantive crime for which he was indicted in either state or federal court, yet found guilty of conspiring to control racketeering through the commission of those same state substantive crimes (murder and conspiracy to murder) which under Ohio substantive law merge into one crime.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. The United States Supreme Court has yet to address the due process issues under RICO, namely: To obtain a conviction, can RICO incorporate as two separate predicate acts the state crimes of murder and conspiracy to murder when defendant previously was acquitted in state court of these crimes and more particularly when these two state crimes under state substantive law merge into one crime for purposes of state conviction and sentencing.

Murder, unlike other crimes, is not a federal crime. It cannot be prosecuted in federal court. It becomes a part of RICO only by its incorporation as a state law violation under 18 U.S.C. §1961, *et seq.*

Unlike bank robbery and other crimes in which each sovereign separately may prosecute, a murder charge as presented here cannot be brought by federal authorities in federal court.

Aside from the basic unfairness that one acquitted of a state crime should not be required to run the gauntlet a second time in a federal court trial, there is legal support to prohibit a second trial by reason of collateral estoppel.

In 9 A.L.R.2d 228 *Res Judicata* - Criminal Cases §6, it states:

> With exceptions to be noted hereinafter, is [sic] is well settled that the criminal nature of a proceeding does not, ipso facto, preclude a judgment rendered therein from operating as collateral estoppel in another criminal prosecution. In other words, the rule of collateral estoppel is applicable in criminal as well as civil cases.

The leading United States Supreme Court case of *Ashe v. Sevenson*, 397 U.S. 436 (1970), is still the law. It has never been overruled. In its decision the Supreme Court stated:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." . . .
>
> • • • • •

> The ultimate question to be determined, then, in the light of *Benton v. Maryland, supra,* is whether this established rule of law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, *North Carolina v. Pearce,* 395 U.S. 711, 717, it surely protects a man who has been acquitted from having to "run the gantlet" a second time. *Green v. United States,* 355 U.S. 184, 190. *Id.* at 444-446.

RICO requires an agreed-to pattern of criminal activity as well as proof that the defendant agreed and participated in two separate predicate crimes. Surely Congress did not intend that one of those predicate crimes could be the *state* crime of murder for which that defendant was acquitted in the state tribunal.

In 47 MISSOURI LAW REVIEW 1, Allen D. Vestal sets forth the basic problems and unfairness of repeated criminal prosecutions:

> The trend in the law today is clearly moving toward protecting defendants from unwarranted duplicative prosecutions. The principle may never become as clear as claim preclusion on the civil side, but, nonetheless, the general principle is gaining support on the criminal side. 47 MISSOURI LAW REVIEW 1 at 46.

In the instant case the Government was estopped from retrying Calandra on the predicate crime of bribery for the reason that he was acquitted of this crime in federal court. The reasoning which prohibited the introduction of bribery evidence against Calandra in support of a conviction of an underlying predicate crime of RICO should apply to the state charge of murder as well.

The anomaly of the RICO conviction is set forth in the concurring opinion below of Judge Merritt:

> It may seem *strange* for a federal court to uphold convictions under a federal statute based on two underlying predicate state offenses for which a defendant has either been acquitted at state trials (the murder of Danny Greene) or for which he could not be separately convicted or punished under state law (conspiracy to murder Danny Greene). But RICO is now unique. *The normal rules of construction do not apply to RICO . . . Russello v. United States,* 104 S.Ct. 296 (1983). In *Russello,* a unanimous Supreme Court has pointed to RICO as the only federal criminal statute which should receive this kind of broad and expansive interpretation: . . . (Emphasis ours.)

The *Russello* case does not deal with the issues involved here. The issue in *Russello* was clearly set forth by Justice Blackmun:

> At issue here is the interpretations of the chapter's forfeiture provision, §1963(a)(1), and, specifically, the meaning of the words "any interest (the defendant) has acquired . . . in violation of Section 1962."

The issues in the case at bar far surpass the limited question in *Russello.* To more aptly state it, it is not only "strange" in the words of Justice Merritt—it is wrong! How can the normal rules or canons of construction of criminal statute be abandoned so as to permit the RICO statute to have such far-reaching effect? How can such a far-reaching and expansive construction be permitted to stand when it undermines the very foundation of criminal law and its attendant constitutional guarantees?

The doctrine of dual sovereignty has not deterred courts from preventing unconscionable application of its rule.

In *Abbate v. United States,* 359 U.S. 187 (1959), a divided court reviewed the history of dual prosecutions

and concluded that federal courts should not be prevented from trying an individual for acts against federal law simply because he has been tried for state crimes involving those same acts. However, the *Abbate* rationale, the unhampered enforcement of *federal* law, presents considerations that are not present in a RICO prosecution built upon the exact *state* crime of which a petitioner previously has been found innocent.

As so aptly put by Justice Aldisert in *United States v. Frumento*, 563 F.2d 1083 (1977) at page 1097:

> An alternative ground for reversal is to demonstrate that the *Abbate* rule is given vigor only when the subsequent federal trial is based on a federal statute protecting a federal interest distinct from the state interest, *see Abbate, supra*, 359 U.S. at 194-95 (majority), 201, 79 S.Ct. 666 (Brennan, J.); *that it does not apply when the primary interest to be vindicated and protected is an interest of the state, whether viewed variously from the perspectives of individual interests, public interests, or social interests.* (Emphasis ours.)

Petitioner respectfully represents that the questions presented for review provide a substantial basis for invoking this Court's discretion to certify the record. This is an important area of federal law; *i.e.*, the incorporation of state law in the federal system and its effect on the balance of federal/state relationships.

Some federal courts have questioned the continued vitality of *Abbate v. United States* in the light of more recent Supreme Court cases. (*See United States v. Johnson*, 516 F.2d 209, 212 (8th Cir. 1975), *United States v. Frumento*, 563 F.2d 1083, 1099 to 1096 (3rd Cir. 1977), *Smith v. United States*, 423 U.S. 1303 (1975) (Justice Douglas sitting alone).)

Because of the questions surrounding the *Abbate* rule, as a blanket rule, plus the increasing use of RICO and its peculiar technique of assimilating state statutes, this issue should be reviewed by this Court.

A. The predicate crimes of murder and conspiracy to murder merge into one predicate crime by reason of Ohio substantive law as well as the language and history of the RICO statute.

The elements of a RICO conspiracy are (1) that the defendant *conspire* to be *associated* with an enterprise in interstate commerce; (2) that he *agree* as part of that conspiracy to *commit a pattern* of two separate predicate acts or crimes; and (3) that the *pattern* of *predicate acts* serves to *conduct* or *further the enterprise*. As was held in *United States v. Winter*, 663 F.2d 1120 (1981), "a RICO conspiracy count must charge as a minimum that each defendant *agreed* to commit *two or more specified* predicate *crimes in addition to charging an agreement to participate* in the conduct of an 'enterprise's' affairs through a 'pattern of racketeering activity.'" *Id.* at 1136 (emphasis ours).

The opinion of the Court of Appeals holds that Calandra committed two (2) predicate acts, conspiracy to murder and murder. Yet the very facts set forth in the Court of Appeals' opinion reveal that Calandra was tried under RICO pursuant to Ohio Revised Code §2923.03, the complicity statute; he was not charged under Ohio Revised Code §2903.01, the murder statute, which would be applicable if he were to be charged as a principal in the murder of Greene.

Because Petitioner was not charged as a principal his liability on the murder charge must be tested by the complicity statute, Ohio Revised Code §2923.03.

This being so, the District Court and the Court of Appeals were required to look at the specific language of §§2923.01 and 2923.03. This both courts failed to do. Instead, they effectively emasculated not only the provisions of paragraph (G), but also of paragraphs (J) and (K) of §2923.01.

The complicity statute, Ohio Revised Code §2923.03 defines culpable conduct as follows:

> (2) Aid or abet another in committing the offense;
>
> (3) Conspire with another to commit the offense in violation of §2923.01;

The conspiracy statute, §2923.01 provides in part:

> (G) When a person is convicted of committing or attempting to commit a specific offense or of *complicity* in the commission of or attempt to commit such offense, he shall *not be convicted of conspiracy* involving the same offense . . .
>
> (K) This Section does *not define a separate conspiracy* offense or penalty where conspiracy is defined as an offense by one or more sections of the Revised Code other than this Section. (Emphasis ours.)

These sections clearly state that conspiracy to murder, and complicity in murder, and murder based on aiding or abetting are not separate acts under the cited statutes.

What the Court of Appeals did was to graft to these statutes its own interpretation of what these statutes mean without support of underlying law. The case of *State v. Lucas,* 85 N.E.2d 154 (Ohio Ct.C.P. 1949), a lower court decision cited by the Court of Appeals, simply does not address the underlying Ohio statutes in question here.

Contrary to the conclusion of the Court of Appeals, this merger is part of the traditional criminal law of Ohio. The substantive murder charge for conspiracy to murder always has been a form of aiding and abetting. *State v. Doty*, 94 Ohio St. 258 (1916). See Committee comments following §2923.03, Ohio Revised Code, which state:

> In essence, this section codifies existing case law with respect to "aiding and abetting." Under the section an accomplice is one who solicits, procures, or conspires with another to commit an offense, aids or abets its commission . . .

Congress chose to define the underlying predicate acts in terms of the Ohio conspiracy statute (R.C. 2923.01) and the Ohio complicity statute (R.C. 2923.03). The Government apparently agrees with this proposition stating in its brief below that "racketeering activity" under RICO for purposes of this case includes R.C. 2923.01, Ohio's conspiracy statute, and that "state predicate offenses under RICO are defined by reference to state law."

The Court of Appeals' decision to deny the effect of the built-in merger defense directly conflicts with the holding in *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981).

Phillips holds that when different chargeable acts of racketeering activity merge, they are not separate acts. They become only one predicate act. They therefore cannot be used to form a pattern of at least *two* separate acts or offenses. *Phillips* involved a RICO conspiracy and drug-related crimes committed in furtherance of it. As to one defendant the claimed predicate acts were: (1) *possession of drugs* with intent to distribute; and (2) *actual distribution of the same drugs*, both violations of 21 U.S.C. §841(a).

The court determined that *two violations merged into one completed offense* under 21 U.S.C. §841(a), and that a merged offense constituted but one predicate act. The court held that since the two claimed predicate acts "were merged into one, there was no separate crime performed in furtherance of the conspiracy's objective that would constitute the necessary second act of racketeering," 664 F.2d at 1039. Because of the merger of the claimed predicate acts the Court stated at page 1039:

> In summary, unless there occurred two predicate acts which Echezarreta agreed to do in furtherance of the conspiracy to import marijuana, there was no pattern of racketeering necessary for conviction for participation in a RICO conspiracy. *There were no two separate acts.* (Emphasis ours.)

Phillips is well reasoned. The question in any case of claimed merger is whether different acts defined as offenses by some jurisdiction are too closely related to be deemed separate. That question ultimately is related to both the jurisdiction's own definitions of those offenses and its decision to make the acts punishable. If a jurisdiction "merges" the acts by legislation forming a part of the definition of the offense, it has decided that *certain conduct is not punishable* when certain other conduct also occurs. Thus, the "merger" is substantive and not merely procedural; it is created to achieve a substantive result.

In this case the merger results from a legislative decision that conduct which is alleged to violate the conspiracy statute and the complicity statute shall constitute one single offense. Federal courts uniformly treat questions of defining separate crimes for prosecution as questions of statutory interpretation to be determined by reference to the applicable statute. *See United States*

v. C.I.T. Corp., 344 U.S. 218 (1952). That is why the *Phillips* court was correct. The separateness for RICO of potential predicate acts should follow the merger doctrine of the same jurisdiction (Ohio) which defined the acts as offenses, especially where the very statute provides for merger.

Thus, predicate acts defined by state law should merge, for RICO purposes, if they merge under the same state law that defines them as offenses. Any other result would be inconsistent with *Phillips*. It also would violate the maxim that where the meaning of a statute is clear, it is the duty of the courts to enforce it accordingly to its plain terms. *See Yates v. United States*, 354 U.S. 298, 305 (1957); *Browder v. United States*, 312 U.S. 335, 338 (1940).

RICO's legislative history continues the accuracy of these judicial opinions. The committee reports are clear on the point:

> "Racketeering activity" is defined in terms of specific State and Federal criminal statutes. (H.R. Report No. 1549, 91st Cong., 2d Sess., p. 35).
>
> • • • • •
>
> "Racketeering activity" is defined in terms of specific State and Federal criminal statutes now characteristically violated by members of organized crime. (S.Rep. No. 617, 91st Cong., 1st Sess., p. 84.)

There is *no prohibition* against RICO borrowing from state statutory law, *but if reference is to be made at all, it must be to an entire statute, not merely to those subsections which promote the prosecution's interest.*

If reference is to be made to O.R.C. §2923.01(A) for purposes of defining predicate crimes, reference must

also be made to subsections (*G*) and (*K*). Selective reference cannot be made for the purpose of transforming one state crime into two or more. The court's failure to apply Ohio statutes completely and to apply the Ohio doctrine of merger of offenses was a denial of due process of law to Petitioner. Accordingly, this issue warrants review by this Court.

II. Since 18 U.S.C. §1962(d) requires that defendant conspire or agree to commit two separate acts in order to establish a pattern of racketeering activity, can these two state acts be established by: (a) conspiracy to murder an individual, and (b) conspiracy or agreement to conspire to murder that same individual.

Section 1962(d) makes it unlawful to conspire to violate any of §1962(a), (b), or (c). The indictment charges Calandra with violating §1962(d) by *conspiring* to violate (*not actually violating*) §1962(c).

Section 1962(c) makes it a crime for one associated with an interstate enterprise to conduct its affairs through a pattern of racketeering activity, the "pattern" consisting of at least two "predicate acts" from those enumerated in §1961(1). Thus, §1962(c) has as one element the actual committing of a two-act pattern.

But the "pattern" element of §1962(*d*) is *conspiring*, or *agreeing*, to commit a pattern of two acts, not as stated in the decision of the Court of Appeals.

In *U. S. v. Winter*, 663 F.2d 1120 (1981), the Court stated at p. 1136:

> We, therefore, hold that a RICO conspiracy count must charge as a minimum that each defendant *agreed to commit two or more specified predicate crimes in*

> *addition to charging an agreement to participate in the conduct of an "enterprise's" affairs through a "pattern of racketeering activity."* (Emphasis ours.)

In *U. S. v. Starnes*, 644 F.2d 673 (1981), the Court stated at p. 678:

> . . . Under RICO, the conspiratorial *objective* is a matter different than the *acts* contemplated by the conspirators. . . . (Emphasis ours.)

In *U. S. v. Barton*, 647 F.2d 224 (1981), the Court said at p. 237:

> . . . The RICO conspiracy count required instead *proof of agreements to commit murder or arson, and, in order to establish a "pattern" of racketeering, required proof of an agreement to perform at least two of the predicate acts.* . . . (Emphasis ours.)

In a recently-decided case, the Court of Appeals for the Second Circuit, *United States v. Ruggiero, et al.* [Nos. 1158, 1362, 1168 and 1363, January 18, 1984], not yet officially published, stated in reversing the RICO conspiracy conviction of one defendant:

> Prevailing case law requires that for the government to convict on a RICO conspiracy it must prove that defendant himself *at least agreed to commit two or more predicate crimes. United States v. Bagaric*, 706 F.2d 42, 62 (2nd Cir., 1983); *United States v. Brooklier*, 685 F.2d 1208, 1223 (9th Cir., 1982), cert. denied, 103 S.Ct. 1194 (1983); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir., 1981), cert. denied, 103 S.Ct. 1250 (1983); *United States v. Sutherland*, 656 F.2d 1181, 1186-87 (5th Cir., 1981), cert. denied, 445 U.S. 949 (1982); *United States v. Barton*, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 854 (1981);

United States v. Elliott, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978). (Emphasis ours.)

In reviewing one of the convictions in *Ruggiero*, the Second Circuit held that when the evidence supported only an *agreement* to commit one predicate crime, there was an absence of the two required predicate acts.

The opinion of the Sixth Circuit in this case holds that to be convicted, defendants must actually have committed a pattern. While stating at pp. 1-2 of its opinion that the conviction was for conspiring to participate in the affairs of an enterprise through a pattern, the Court goes on to say that this was a violation of *both* §1962(c) and (d).

This opinion is unique in that it strips away the very language of the charge against Calandra which required that he be found guilty of *conspiring* to violate (not actually violating) §1962(c). This opinion means that a RICO conspiracy prosecution must prove the actual commission of a pattern. *It leaves unclear whether, in addition, an agreement to commit two acts is necessary for a 1962(d) conviction.*

The Court of Appeals concluded that since the jury presumably found Calandra conspired to murder and aided in the same murder, that Calandra had committed two predicate acts. (Incidentally, the District Court did not permit special interrogatories to test such finding.)

Petitioner submits that to commit a RICO conspiracy he would have to *agree* to undertake two predicate acts. See, *U. S. v. Elliott*, 571 F.2d 880 (5th Cir. 1978) at 906-7. It would not be sufficient to convict Petitioner on a finding that he agreed to do only one act and actually committed that very same act.

While the commission of an act may indeed prove an agreement to commit that act, this is not the same as holding that Petitioner agreed to commit *two* acts or agreed to commit a RICO pattern.

Although the commission of the predicate act of murder may be used to infer the agreement to commit murder necessary to establish one predicate act of a RICO pattern, it cannot be said that the commission of the second predicate act—conspiring to murder the same individual —will support an inference of agreement to commit the second predicate act. In both instances the commission of the two predicate acts is used to support only one agreement to murder Greene.

If agreement is the essence of conspiracy, then it is a pattern that defendant must agree to commit. If he agrees only to commit one predicate act, then he has not committed the requisite pattern.

If the conviction stands in this posture, the pattern requirement of §1961(5) will be effectively nullified in any RICO conspiracy case. In effect, the court will be sanctioning conviction in conspiracy cases where a RICO defendant only agreed to perform one predicate act.

In essence, this Court has determined that the act of conspiring to commit murder and conspiring to conspire to commit murder are two separate predicate crimes making possible a conviction under RICO. Surely, this Catch-22 was not the intent of Congress. It is not sanctioned by the merger of federal authority. It is not and should not be the law.

In this regard, this Court should consider the words of Chief Judge Lay in *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982), at 659:

If, in fact, the government did not prove the defendants violated RICO, then it is fundamental to fair process of law, regardless of how much we condemn their wrongful conduct, that they cannot be convicted under the Act.

We are satisfied that RICO was not designed to serve as a recidivist statute, imposing heavier sentences for crimes which are already punishable under other statutes. The Act was not intended to be a catchall reaching all concerted action of two or more criminals involving two or more of the designated crimes.

CONCLUSION

The expansive construction applied to the RICO statute by the Court of Appeals for the Sixth Circuit extends the tentacles of RICO in such fashion as to effectively deny due process of law to those charged under that Act.

The decision changes the substantive law of Ohio and incorporates the Ohio law into RICO in a manner not permitted by the Ohio courts. As a result of this, Petitioner was denied his constitutional right to a fair and just trial, and the State of Ohio denied its right to legislate and interpret its own statutes.

In effect, the decision makes RICO a recidivist statute. This not only conflicts with decisions of other appellate circuits but subjects the individual rights of Petitioner to the whims and unrestrained power of the federal government.

The unsettled issues referred to in this brief pose questions of constitutional importance which warrant review by the Supreme Court of the United States.

For the foregoing reasons, Petitioner requests that a Writ of Certiorari be granted by this Court.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed January 9, 1984)

Nos. 82-3498, 3509, 3510, 3511, 3512, 3513, and 3606

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES T. LICAVOLI (82-3498),
ANTHONY LIBERATORE (82-3509, 82-3606),
JOHN P. CALANDRA (82-3510),
PASQUALE CISTERNINO (82-3511),
RONALD CARABBIA (82-3512),
KENNETH CIARCIA (82-3513),
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: MERRITT and KENNEDY, *Circuit Judges*, and PRATT, *District Judge.**

KENNEDY, *Circuit Judge*, delivered the opinion of the Court, in which PRATT, *District Judge* concurred. MERRITT, *Circuit Judge*, (pp. 23-24) filed a separate concurring opinion.

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*Honorable Philip Pratt, United States District Court for the Eastern District of Michigan, sitting by designation.

KENNEDY, *Circuit Judge*. The six defendant-appellants were convicted of conspiring to participate in the affairs of an enterprise **[2]** through a pattern of racketeering activities in violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1962(c) and (d)[1] following a jury trial, and now appeal those convictions. Defendant Liberatore also appeals a denial of his motion for a new trial on a bribery conviction. All seven appeals have been consolidated. We affirm the judgments of conviction of all defendants.

In order to sustain a prosecution under RICO the government must establish that defendants engaged in a "pattern of racketeering activity," defined as at least two acts of racketeering activity. 18 U.S.C. § 1961(5). "Racketeering activity" is defined in 18 U.S.C. § 1961(1). The facts elicited by the prosecution at trial to prove the defendants' pattern of racketeering activity are lengthy and complex. Briefly, the government asserts (and we agree) that the evidence, viewed in the light most favorable to it, established the following.

I. Facts

Defendant Licavoli is a leader of organized crime in Cleveland. Liberatore is his second-in-command, and Calandra also holds a position of confidence and responsibility within the organization. Carabbia and Cisternino

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1. Those sections provide as follows:

(c) It shall be unlawful for any person to be employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to violate any of the provisions of subsections (a), (b), or (c) of this section.

act for the organization, carrying out the orders of the top men. Ciarcia manages a car dealership and supplies vehicles for the organization's criminal activities and also acts on behalf of the organization in other ways.

[3] In the spring of 1976 Licavoli decided that he needed to have one Danny Greene killed. Greene was the leader of a rival criminal organization which had developed a monopoly on criminal activity in West Cleveland. Licavoli had others in his organization contact Raymond Ferritto regarding his wish to have Greene killed.[2] Ferritto testified that he met at various times with each of the defendants (except Liberatore), sometimes separately, sometimes in groups, to plan Greene's murder. Ferritto stalked Greene for some months without success, sometimes assisted by Cisternino. After Ferritto had been on the job for some time he asked Licavoli for money to cover his expenses, and he was eventually given $5,000 by Carabbia. Licavoli also told Ferritto that he would get a percentage of money derived from gambling in the Warren and Youngstown areas when the murder was accomplished.

Ferritto and Cisternino attempted to bomb Greene's apartment building in order to kill him, but never carried through because of the regular presence of older people in the area. On another occasion they drove to a party attended by Greene intending to kill him. They located Greene's car but found that it was guarded by members of Greene's criminal organization seated in an adjacent car.

Meanwhile Liberatore arranged with two other men, Aratari[3] and Guiles, to kill others in Greene's criminal

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2. Ferritto later testified against all six defendants in their state trials for Greene's murder.

3. Aratari testified at the trial in this case.

organization, and ultimately to help kill Greene as well. Aratari and Guiles were at times assisted in their efforts by defendants Carabbia, Calandra, Cisternino and Ciarcia. Ciarcia and another man provided Aratari and Guiles with a car and weapons.

Licavoli had Greene's phone tapped in an effort to obtain reliable information regarding Greene's daily activities. Carabbia [4] and Cisternino gave Ferritto the resulting tapes. One tape revealed that Greene was to go to a dentist's appointment at 2:30 p.m. on Thursday, October 6, 1977. Defendants Licavoli, Cisternino and Carabbia played this tape for Ferritto on Monday, October 3.

On Thursday, the day of Greene's dentist appointment, Cisternino and Ferritto built a bomb in an apartment maintained by Cisternino. Ferritto drove to the vicinity of the dentist's office with the bomb in his car, a Plymouth. Carrabbia drove a second car to the office, a Nova. This car had a special box mounted on the side in which the bomb was to be placed. Cisternino remained behind at the apartment to listen to a police scanner for calls. A few minutes after Ferritto and Carabbia arrived at the dentist's, Aratari and Guiles arrived in another car, supplied by Ciarcia as the car to be used in "the Danny Greene case." Guiles was armed with a high powered rifle. The plan was for Guiles to shoot Greene if he had the opportunity. The bomb was to be used as a backup method.

Greene arrived for his appointment, parked his car and entered the office. Guiles apparently had no opportunity to shoot. A few minutes later a parking space opened next to Greene's car. Ferritto placed the bomb in the box on the side of the Nova, parked the Nova next to Greene's car, and activated the bomb. Then he got into the driver's seat of the Plymouth, which was parked

down the block. When Greene emerged from the office Ferritto began to drive away, with Carabbia in the back seat. Carabbia then detonated the bomb with a remote control device and Danny Greene was killed.

All six defendants in the present case were tried for Danny Greene's murder in state court. Cisternino, Carabbia and Ciarcia were convicted of Greene's murder.

The RICO prosecution now on appeal also relied on a separate set of events to establish a predicate criminal act. [5] Ms. Geraldine Rabinowitz[4] worked as a file clerk in the Cleveland office of the FBI, while her then-fiance Jeffrey Rabinowitz worked at the car dealership that Ciarcia managed. In the spring of 1977 Ciarcia asked Ms. Rabinowitz to obtain confidential information from the FBI regarding investigations of himself, Liberatore, and Licavoli. Ms. Rabinowitz complied, after some hesitation, and continued to steal confidential information for Ciarcia from time to time throughout the summer of 1977. Ciarcia assured Ms. Rabinowitz that she would in return be "covered" for a down payment on a new home that she and her fiance planned to buy. On October 12, 1977 the Rabinowitzes met with Liberatore and Ciarcia, and the Rabinowitzes asked for $15,000 for a down payment on the home. Although Liberatore was at first unwilling to comply with this request, the next day he delivered a paper bag to Ms. Rabinowitz containing $15,000 in cash. Counsel for Liberatore characterized this payment as a "loan", but no interest was set, no repayment schedule made, and no collateral specified. The stolen FBI documents were later found at Ciarcia's car dealership. All six defendants were charged with two counts of bribery

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4. Ms. Rabinowitz testified at the federal bribery trial and the trial in this case.

and one count of conspiracy to commit bribery and were tried in federal court. Ciarcia pleaded guilty to all three counts, and Liberatore was convicted of the conspiracy count and one substantive count.

All six defendants were tried together in federal court for the RICO violation. The jury found all six guilty of having violated RICO. Defendants now raise a large number of issues on appeal.

II. Conspiracy to Murder May Be a Predicate Act for a RICO Conviction

The District Court instructed the jury that there were three possible acts which the jury could find to serve as [6] predicate acts of racketeering for the RICO charge. These were: 1) conspiracy to murder Danny Greene; 2) the murder of Danny Greene; and 3) bribery. The court instructed that the bribery act applied only to defendants Liberatore and Ciarcia. The jury therefore had to find that the other four defendants both conspired to murder, and murdered Danny Greene in order to convict them of the RICO violation. These four defendants (Licavoli, Calandra, Carabbia, Cisternino) now argue that conspiracy to commit murder cannot serve as a predicate act for a RICO conviction, and that their RICO convictions therefore cannot stand.

Under 18 U.S.C. § 1961(1)(A) racketeering activity includes "any act or threat involving murder. . . ." Conspiracy to murder on its face fits within this definition of racketeering activity. Conspiracy is "an act . . . involving murder." However the original versions of the bill that ultimately became RICO specifically included conspiracy as a predicate act under section 1961, while the final bill did not. Defendants argue that Congress' failure specifically to enumerate conspiracy in the final version

of the bill demonstrates a legislative intent not to allow conspiracy as a predicate act.

The Second Circuit rejected this argument with respect to conspiracies to commit acts listed ir the definition of racketeering activity under section 1961(1)(D) in *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). *See also United States v. Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982) (conspiracy to extort may be a predicate act), *cert. denied*, ... U.S. ....., 103 S. Ct. 1194 (1983); *United States v. Phillips*, 664 F.2d 971, 1015 (5th Cir. 1981) (conspiracy to import marijuana may be a predicate act), *cert. denied*, 455 U.S. 912 (1982).

Under 18 U.S.C. § 1961(1)(D), racketeering activity includes:

> [A]ny offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the [7] felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

The Second Circuit in *Weisman* based its holding on the expansive language in (D), "any offense involving" the enumerated substantive crimes, "punishable under any law of the United States."[5] The court noted:

> This conclusion is bolstered by the fact that subsections (B) and (C) [of § 1961(1)], which list most of the other predicate acts chargeable under RICO, conspicuously lack the broad "any offense involving" language of subsection (D) and, in fact, require that

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5. This language also appeared in the original drafts of the bill that became RICO.

> the act be indictable under specifically enumerated sections of the criminal code.[6]

624 F.2d at 1124.

Subsection (A) of 18 U.S.C. § 1961(1) contains language similarly expansive to that in subsection (D). Under (A), racketeering activity includes "any act or threat involving the substantive crime, "chargeable under state law and punishable by imprisonment for more than one year." The "provisions of . . . [RICO] should be liberally construed to effectuate its remedial purposes."[7] Organized Crime Control Act of [8] 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. We see no indication that Congress intended conspiracy to commit murder not to be a predicate act under section 1961(1)(A) along with conspiracy to extort, to commit securities fraud or to import drugs under section 1961(1)(D). The Fifth Circuit took the position that conspiracy to commit murder may be a predicate act in *United States v. Welch*, 656 F.2d 1039, 1063 n.32 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), saying,

> There is merit to the argument that subsection A [of 18 U.S.C. § 1961(1)] is as broad and inclusive as the language of subsection D. If conspiracy to commit a section D offense can serve as a predicate act for a RICO charge, then conspiracy to commit a subsection

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6. *Cf. Brooklier, supra*, which holds that

> [c]onspiracies or attempts can serve as the underlying racketeering activities because 18 U.S.C. § 1961(1)(B) defines "racketeering activity" as including those offenses indictable under 18 U.S.C. § 1951. Section 1951, in turn, makes punishable attempts or conspiracies to obstruct, delay, or affect commerce by robbery, extortion or physical violence.

685 F.2d at 1216.

7. Courts have construed the provisions of RICO liberally in applying its criminal remedies. *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 245 n. 25 (1982), and cases cited therein.

> A offense should also be able to serve as a predicate act. The language of subsection A itself—which includes "any act or threat involving murder"—appears to contemplate a conspiracy to commit murder. A conspiracy to commit murder is an act *involving* murder. (emphasis in original)

We adopt the Fifth Circuit's reasoning in *Welch* and hold that conspiracy to commit murder may be a predicate act under 18 U.S.C. § 1961(1)(A) for a RICO charge.

III. Murder and Conspiracy to Murder Are Separate Offenses Under Ohio Law and May Both Be Predicate Acts Under RICO

For a defendant to be convicted under RICO he must have committed more than one act of racketeering activity. In order for a state crime, such as murder or conspiracy to murder to serve as a predicate act, it must be "chargeable under state law and punishable by imprisonment for more than one year" under 18 U.S.C. § 1961(1)(A). Federal law holds that conspiracy to commit a substantive offense and the substantive offense itself are two separate crimes. *See, e.g., Iannelli v. United States*, 420 U.S. 770, 777 (1975). Under Ohio law, conspiracy to murder and murder are also two separate crimes. **[9]** However, a person convicted of the substantive crime "shall not be convicted of conspiracy involving the same offense." Ohio Rev. Code § 2923.01(G). Thus under Ohio law a person cannot be convicted of or sentenced for both conspiracy to commit murder and the murder crime itself. Defendants argue that the two acts consequently are not both "chargeable under state law and punishable for more than one year."

We disagree, for two reasons. First Ohio law, in both the Ohio Revised Code and the earlier case law, provides that conspiracy to commit a substantive act and the sub-

stantive act are separate offenses, both separately chargeable under state law. In *State v. Lucas*, 85 N.E. 2d 154, 156 (Ohio Ct. C.P. 1949), the court stated:

> The conspiracy to commit a crime is an entirely different offense from the crime that is the object of the conspiracy. It is not a substantive offense, but essentially a crime of intent. It does not merge in the completed offense. The unlawful combination and confederacy constitute the essential element of criminal conspiracy rather than the overt acts done in pursuance thereof and neither the success nor failure of criminal conspiracies is determinative of the guilt or innocence of the conspirators.

Lucas predates the current Ohio statutory provision, Ohio Rev. Code § 2923.01.[8] The statute in *Lucas* made it a crime **[10]** to conspire to defraud. Under this statute, unlike the current one, a defendant could be convicted and sentenced separately for the substantive crime and conspiracy to commit the substantive crime. *Lucas* is significant here, however, for its articulation of the common law of Ohio that the conspiracy and the substantive crime are "entirely different."

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8. The statute provides, in part:

> (A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, corrupting another with drugs, theft of drugs, or illegal processing of drug documents shall do either of the following:
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> (1) With another person or persons, plan or aid in planning the commission of any such offense;
>
> (2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commission of any such offense.

The Ohio Revised Code has not modified this common law precept. Murder is a crime, chargeable under Ohio law, Ohio Rev. Code § 2903.02, and punishable by imprisonment for more than one year, § 2929.02. Conspiracy is also a crime in Ohio, Ohio Rev. Code § 2923.01(A), and is punishable by imprisonment for more than one year, § 2929.11. RICO nowhere indicates that two criminal acts otherwise qualifying as predicate acts may not both constitute predicate acts because under state law a defendant could not be convicted of or sentenced for both crimes.

Secondly, contrary to defendants' contention, it is irrelevant whether these particular defendants could have been charged under Ohio law and imprisoned for more than one year for both conspiracy to murder and murder. This argument has been raised and rejected several times in the context of state statutes of limitations, when the state statute has run on a state crime which is offered as a predicate act for a RICO violation. Courts have held that regardless of the running of the state statute the defendant is still "chargeable" with the state offense within the meaning of 18 U.S.C. § 1961(1)(A). *United States v. Malatesta*, 583 F.2d 748, 758 (5th Cir. 1978), *cert. denied*, 440 U.S. 692 (1979); *United States v. Davis*, 576 F.2d 1065, 1066-67 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978); *United States v. Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977). The reference to state law in the statute is simply to define the wrongful conduct, and is not meant to incorporate state procedural law. *United States v. Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The Third Circuit noted in *United States* **[11]** *v. Frumento*, 563 F.2d 1083, 1087 n.8A (3d Cir. 1977), *cert, denied*, 434 U.S. 1072 (1978):

> Section 1961 requires, in our view, only that the *conduct* on which the federal charge is based be typical of the serious crime dealt with by the state statute,

> not that the particular defendant be "chargeable under State law" at the time of the federal indictment. (emphasis in original)

We agree and hold that conspiracy to murder and murder may both constitute predicate acts in this case, regardless of the fact that a defendant cannot under Ohio law be separately punished for having committed both crimes. Ohio law does define the two acts as separate crimes, each punishable by imprisonment for more than one year, and this is all that is required under 18 U.S.C. § 1961 (1)(A).

IV. Acquittal in State Court of Criminal Acts Does Not Bar Their Use As Predicate Acts for a RICO Conviction

Defendants Licavoli and Calandra were acquitted in state court proceedings of murdering Greene and conspiring to murder Greene. Consequently, they argue, they were not "chargeable" with the murder or conspiracy to commit murder, as required under 18 U.S.C. § 1961(1)(A), and murder and conspiracy to commit murder could not therefore serve as predicate acts for their RICO convictions.

We disagree. *Frumento* is directly on point. Defendants in that case were acquitted in state court on charges of bribery, extortion and conspiracy to accept bribes. They were then convicted in federal court of violating 18 U.S.C. §1962(c) and (d), with the above crimes as predicate acts. On appeal defendants argued that the conviction was barred by the double jeopardy clause of the fifth amendment. The Third Circuit disagreed. The court said,

> **[12]** [RICO] forbids "racketeering," not state offenses per se. The state offenses referred to in the federal act are definitional only; racketeering, the fed-

> eral crime, is defined as a matter of legislative draftsmanship by a reference to state law crimes. This is not to say . . . that the federal statute punishes the same conduct as that reached by state law. The gravamen of section 1962 is a violation of federal law and "reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage." *United States v Cerone*, 452 F.2d 274, 286 (7th Cir. 1971). (Footnote omitted.)

563 F.2d at 1087. *See also United States v. Phillips*, 664 F.2d 971, 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982); *United States v. Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

V. The Prior Testimony of Raymond Ferritto Was Properly Admitted at Trial

Ferritto had testified at the state murder trials[9] of the six defendants. He refused to testify at the federal RICO trial, however, claiming that the government had breached its plea agreement with him, and consequently he had to serve more time than he had been promised. Also, he asked for immunity from prosecution for perjury as a condition of his testifying. The government granted him use immunity, that is immunity from the use of his testimony in the RICO case to prove that his prior testimony was perjurious, but granted him no immunity for any perjury he might commit in the RICO trial itself. Ferritto still refused to testify and the court held him in contempt.

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9. There were three separate trials in state court: 1) the trial of Licavoli, Cisternino, and Carabbia; 2) the trial of Calandra, Ciarcia and Lanci (not a defendant in this action); and 3) Liberatore's trial. The charges in all three trials were conspiracy to murder Danny Greene, and Greene's murder.

[13] The court then granted the government's motion to read Ferritto's testimony from the three state trials into the record, finding that Ferritto was "unavailable" within the meaning of Fed. Rule Evid. 804(a). The court instructed the jury that Ferritto's testimony in the state trial of Licavoli, Cisternino and Carabbia was admissible only against those three defendants; Ferritto's testimony from the trial of Calandra and Ciarcia was admissible only as to those two, and Ferritto's testimony in Liberatore's trial was admissible only against Liberatore. Ferritto's testimony in the first two trials was substantially the same. Upon the request of Liberatore's attorney the prosecution did not read Ferritto's full testimony from Liberatore's trial, but only the few lines that related specifically to Liberatore.

Defendants make several arguments regarding Ferritto's testimony. First they claim that the government was responsible for Ferritto's failure to testify. He was therefore not "unavailable" under Fed. Rule Evid. 804(a), and his testimony was inadmissible. Rule 804(a) states, in part "[a] declarant is not unavailable as a witness if his . . . absence is due to the procurement or wrongdoing of the proponent of his statement *for the purpose of preventing the witness from attending or testifying*" (emphasis added). The law is clear that Ferritto's prior testimony, if otherwise admissible, was not made inadmissible by the government's actions unless the government actually sought to prevent the witness from testifying. *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982), *cert. denied*, ... U.S. ....., 103 S.Ct. 1501 (1983); *United States v. Seijo*, 595 F.2d 116, 119-20 (2d Cir. 1979). This was hardly the case. Ferritto was the government's star witness. The government even offered him immunity from possible perjury prosecution to induce him to testify. There is no

suggestion in the record that the government breached its plea agreement *in order* to prevent Ferritto from testifying at the RICO trial.

[14] Defendants further argue that Ferritto's testimony should not have been admitted because 1) defendants did not have an adequate motive and opportunity to cross-examine Ferritto in the state proceedings, and 2) admission of the prior testimony violated the confrontation clause of the sixth amendment.

Federal Rule of Evidence 804(b)(1) allows admission of prior testimony if the issues in both cases are sufficiently similar so as to give the party against whom the testimony is offered "an opportunity and similar motive to develop the testimony." Here the issues in the cases were nearly identical, since in the state cases the defendants were charged with murder and conspiracy to commit murder, and in the RICO prosecution these two acts constituted the predicate acts for the RICO conviction. Defendants argue that because of the additional "enterprise" element that must be shown in a RICO prosecution their motive to cross-examine was not the same here as in the state prosecutions. However, defendants have failed to point to any matter that they would have raised in cross-examination with respect to the enterprise element that they did not raise in the prior proceedings.

Each defendant certainly had adequate motive to cross-examine Ferritto with respect to testimony given in his own trial. The jury was carefully instructed to consider against each defendant only the testimony that Ferritto had given at the defendant's own trial. We agree with defendants that it may be humanly impossible for a juror completely to compartmentalize multiple versions of an event and apply each version only against a certain defendant. How-

ever, this is not to say that evidence implicating more than one defendant in a joint prosecution may never be admitted with an instruction that it applies only to a single defendant. In this case the testimony in the state trials was substantially the same, so it is hard to see how any of the defendants was prejudiced by admission of more than one version of the events. To the extent that there are discrepancies in Ferritto's testimony the jury was made **[15]** aware of these by virtue of having heard the different versions. The jury heard both Ferritto's direct testimony and cross-examinations. We cannot say that Ferritto's testimony was improperly admitted.

The above analysis applies as well with respect to defendants' confrontation clause argument. The Supreme Court long ago held that admitting testimony of an unavailable witness does not violate the confrontation clause. *Mattox v. United States,* 156 U.S. 237, 242-44 (1895). The confrontation clause requires that a hearsay declarant be unavailable, and that his statements bear some "indicia of reliability." *Ohio v. Roberts,* 448 U.S. 56, 65 (1980); *Mancussi v. Stubbs,* 408 U.S. 204, 213 (1974); *California v. Green,* 399 U.S. 149, 161 (1970); *Pointer v. Texas,* 380 U.S. 400, 407 (1965). We have concluded that Ferritto was unavailable. Ferritto has been cross-examined at length by one or more of the defendants on all of the testimony that was read to the jury and those cross-examinations were also read to the jury. All of the defendants have cross-examined Ferritto about the same set of facts. The defendants' motives for cross-examination at the state trials and the RICO trial were substantially identical. We find that the indicia of reliability necessary to satisfy the confrontation clause are present here and hold that Ferritto's testimony in the state prosecutions was properly admitted.

Defendants also claim that they were prejudiced by the fact that the District Court had Ferritto's testimony re-read to the jury, upon the jury's request, during jury deliberations. It is within the judge's discretion to re-read testimony for a deliberating jury. Indeed, the cases in this area generally challenge the judge's decision *not* to have the testimony re-read to the jury. *See, e.g., United States v. Toney,* 440 F.2d 590, 591-92 (6th Cir. 1971); *United States v. Almonte,* 594 F.2d 261, 265 (1st Cir. 1979). The transcripts of Ferritto's testimony are lengthy and comprised a large portion of the state's case, and it is understandable that the jury felt a need to hear **[16]** them a second time during deliberation. Defendants have failed to show that the District Court abused its discretion in allowing the transcripts to be read a second time.

VI. There Was Sufficient Evidence for the Jury to Convict the Defendants

Defendant Carabbia argues that there was insufficient evidence to show that defendants agreed to participate in the affairs of the enterprise. We find this claim to be wholly without merit, as the summary of facts recited above—taken from testimony introduced at trial—demonstrates.

Defendant Liberatore argues that there was insufficient evidence to establish that he and Ciarcia bribed Ms. Rabinowitz to provide them with confidential FBI information and documents. This Court dealt fully with this question and resolved it against Liberatore in *United States v. Lanci and Liberatore,* 669 F.2d 391, 393 (6th Cir.), *cert. denied,* 457 U.S. 1134 (1982), and we will not consider it further here.

VII. Principles of Double Jeopardy Did Not Bar the Government From Using Bribery As a Predicate Offense for the RICO Convictions

Defendants Liberatore and Ciarcia were convicted in federal court of bribing Ms. Rabinowitz. This bribery offense was also used as a predicate act for the RICO convictions of these two defendants. Liberatore and Ciarcia now claim that use of the bribery offense in the RICO prosecution violated the double jeopardy clause of the fifth amendment.

The Supreme Court articulated the analysis to be applied to statutory schemes in order to evaluate them for double jeopardy purposes in *Whalen v. United States*, 445 U.S. 684 (1980). First, courts should apply the "*Blockburger* test" articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), in order to determine whether the same act constitutes a violation of two distinct statutory provisions. To see whether **[17]** there are two offenses or only one the court must determine whether *each* provision requires proof of a fact which the other does not. When the offenses are the same under the *Blockburger* test, *Whalen* holds that "cumulative sentences are not permitted, unless elsewhere specifically authorized by Congress." 445 U.S. at 692.

Even if the predicate act of bribery and the RICO charge fail the *Blockburger* test, which we do not decide,[10] Congress did specifically authorize cumulative sentences under RICO. *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982); *United States v. Anderson*, 626 F.2d

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10. *Cf. United States v. Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), in which the court concluded that the enterprise element of the RICO offense constitutes an element of the crime not required for the predicate criminal acts.

1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). As the *Rone* court noted:

> There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the underlying or predicate crimes which make up the racketeering pattern. The racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions.

598 F.2d at 571.

[18] This Court has ruled on a closely related question in *United States v. Morelli*, 643 F.2d 402 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981). Morelli was convicted of two counts of wire fraud, and these acts were used as predicate offenses for a RICO conviction. Morelli complained that he was subject to cruel and unusual punishment in violation of the eighth amendment because he was sentenced to fifteen years for the RICO violation, in addition to ten years for the wire fraud crimes.[11] We held that Congress "may constitutionally make the commission of crimes within a specified period of time and within the course of a particular type of enterprise an independent

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11. Appellants Liberatore and Ciarcia are serving concurrent, not consecutive sentences for their bribery and RICO convictions.

criminal offense. . . ." 643 F.2d at 413. We now hold that there was no violation of double jeopardy in trying defendants Liberatore and Ciarcia for both the federal bribery charge and the RICO charge.

VIII. The District Court Did Not Err in Its Evidentiary Rulings

We have reviewed defendants' challenges to various evidentiary rulings made by the District Court in admitting:

1) references to court-ordered electronic surveillance of Licavoli in which the agent referred to Licavoli's activities as "criminal";

2) references to prosecution witnesses as being in the Witness Protection Program as suggesting that defendants had threatened the witnesses;

3) references to plea bargaining agreements as suggesting that the government vouched for the truthfulness of the witness' testimony;

4) the admission of co-conspirator statements under Fed. Rule Evid. 804(d)(2)(E) as violating the confrontation clause of the sixth amendment.

We find all of these challenges to be without merit.

[19] IX. The District Court Did Not Err in Denying Defendants' Motion for Severance

Defendants Licavoli, Calandra and Cisternino argue that the District Court erred in failing to grant their motions for severance at trial under Rule 14, Fed. R. Crim. Pro. They argue that they were prejudiced by evidence offered against other defendants at trial, and that the court's instructions to the jury could not have obviated

that prejudice. Defendants complain primarily of evidence of bribery introduced against Liberatore and Ciarcia.

Rule 14 provides that severance may be granted if substantial prejudice would result to an individual defendant tried jointly with another.[12] The question of whether to grant a motion for severance is committed to the trial court's discretion, and rulings under Rule 14 are reviewable only on abuse of discretion. *United States v. Goldfarb*, 643 F.2d 422, 434 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981); *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980); *United States v. Mardian*, 546 F.2d 973, 977 (D.C. Cir. 1976) (en banc); *United States v. Marionneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975), *cert. denied*, 434 U.S. 903 (1977).

The general rule in conspiracy cases is that persons indicted together should be tried together. *United States v. Robinson*, 707 F.2d 872, 879 (6th Cir. 1983); *United States v. Dye*, 508 F.2d 1226, 1236 (6th Cir.), *cert. denied*, 420 U.S. 974 (1975); *United States v. Echeles*, 352 F.2d 892, 896 (7th Cir. 1965). This is particularly the case when, as here, offenses charged may be established against all the defendants with the same evidence. *United States v. Hamilton*, 689 F.2d 1262, 1275 **[20]** (6th Cir.), *cert. denied*, ... U.S. ....., 103 S.Ct. 753 (1982); *Dye*, 508 F.2d at 1236; *United States v. McPartin*, 595 F.2d 1321, 1333 (7th Cir. 1979). The potential prejudice to the defendant must be balanced against competing societal goals of efficient and speedy trials. *United States v. Davis*, 707 F.2d 880 (6th

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12. Rule 14 provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

Cir. 1983); *United States v. Kopituk*, 690 F.2d 1289, 1317-18 (11th Cir. 1982); *Dye*, 508 F.2d at 1236; *United States v. Rogers*, 475 F.2d 821, 828 (7th Cir. 1973). However, a single joint trial is impermissible if it violates a defendant's right to a fundamentally fair trial. *Echeles*, 352 F.2d at 896; *Barton v. United States*, 263 F.2d 894, 898 (5th Cir. 1959).

Courts have put a heavy burden on defendants seeking severance, requiring a strong showing of prejudice. *Opper v. United States*, 348 U.S. 84, 94 (1954); *Hamilton*, 689 F.2d at 1275; *Bright*, 630 F.2d at 813; *United States v. Marable*, 574 F.2d 224, 231 (5th Cir. 1978). An especially compelling showing is required in RICO prosecutions. As the court noted in *United States v. Provenzano*, 688 F.2d 194, 199 (3d Cir.), *cert. denied*, ... U.S. ....., 103 S.Ct. 492 (1982), "in a case of this nature it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed."

Upon a careful review of the record we cannot say that defendants have shown the compelling prejudice required for a granting of severance. At the heart of defendants' severance claim is the fact that some of them were not named in all three of the predicate racketeering acts for which evidence was introduced. We recently held in *Davis* that this circumstance alone does not necessitate severance. 707 F.2d at 883. The jury was carefully instructed that the evidence of bribery was admissible only against Liberatore and Ciarcia, and there is nothing in the record to indicate that the jurors were confused or misled. Testimony regarding the other defendants in connection with the circumstances of the bribery was tangential, and overshadowed by the major role in the events played by Liberatore and Ciarcia. The slight potential **[21]** prejudice to defendants Licavoli, Calandra and Cisternino in this

case by these tangential references is outweighed by the judicial and societal interests in trying all of the defendants together. We hold that the trial judge did not abuse his discretion in denying defendants' motion for severance.

X. The District Court Did Not Err in Declining to Excuse a Juror During the Trial

Mr. McCourt, a juror in defendants' RICO trial, discovered late in the presentation of the government's case that he was acquainted with one of the government's witnesses, a Ms. Weiss who managed the apartment house involved in the aborted bombing attempt. Mr. McCourt knew Ms. Weiss because his aunt and uncle lived in the same building as Danny Greene, but had not known Ms. Weiss' last name until he saw her at trial.

Defendant Licavoli maintains that the juror "wilfully concealed material facts bearing on his suitability." However, Mr. McCourt had stated during jury selection that he had had some contacts with Danny Greene. He could not have concealed his acquaintance with the witness because he did not know that she would be a witness until he saw her at trial. At that time he promptly informed the court that he knew Ms. Weiss. The trial judge then questioned Mr. McCourt regarding his ability to make an impartial judgment, and Mr. McCourt said that he felt he could. It is hard to see how Mr. McCourt's nodding acquaintance with a minor witness for the prosecution could have seriously prejudiced defendants. Ms. Weiss testified that Danny Greene lived with a woman in the apartment building that she managed, and that she had found a box and a bottle on the property. These facts were not in dispute, and counsel for defendant Licavoli chose not to cross-examine Ms. Weiss. Mr. McCourt had

personal knowledge that older people frequently congregated in the lobby of the building, but this fact was also not in dispute. Accordingly [22] we hold that the District Court did not err in its failure to excuse Mr. McCourt.

XI. The District Court Did Not Err in Denying Liberatore's Motion for a New Trial

Defendant Liberatore appeals a denial of a motion for a new trial on his federal bribery conviction. Liberatore argues that there were significant inconsistencies in the testimony of witnesses who testified against him. The District Court found these inconsistencies to be insubstantial, and, having reviewed the record, we agree.

Defendants have raised a number of other claims, which we do not discuss here. We have considered these and find them without merit. We affirm defendants' RICO convictions and affirm the District Court's denial of Liberatore's motion for a new trial.

[23] MERRITT, *Circuit Judge* concurring. I concur in the clear and well reasoned opinion prepared by Judge Kennedy.

It may seem strange for a federal court to uphold convictions under a federal statute based on two underlying predicate state offenses for which a defendant has either been acquitted at state trials (the murder of Danny Greene) or for which he could not be separately convicted or punished under state law (conspiracy to murder Danny Greene). But RICO is now unique. The normal rules of construction do not apply to RICO. Although I had earlier believed that normal canons of construction applicable to other criminal statutes should be applied to RICO, *see United States v. Sutton*, 605 F.2d 200 (1979), *reversed en*

banc, 642 F.2d 1001, 1042 (6th Cir. 1980) (Merritt, J., dissenting), the Supreme Court has now made it clear that RICO is to be given the broadest and most expansive possible interpretation in order to carry out Congressional intent aimed at eliminating organized crime. *See United States v. Turkette*, 452 U.S. 576 (1981) (RICO not limited to infiltration of a legitimate "enterprise"); *Russello v. United States*, 104 S.Ct. 296 (1983). In *Russello*, a unanimous Supreme Court has pointed to RICO as the only federal criminal statute which should receive this kind of broad and expansive interpretation:

> The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. . . . Further, Congress directed, by § 904(a) of Pub. L. 91-452, 84 Stat. 947: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." *So far as we have been made aware, this is the only substantive federal criminal statute that contains such a directive.* . . .

104 S.Ct. at 302. (emphasis added). Thus, RICO, liberally construed as required by the Supreme Court, can reasonably be interpreted, and therefore should be interpreted, **[24]** so that a defendant can be convicted even though he has already been acquitted or convicted of the two underlying offenses in state court and even though he could not be convicted or punished for both offenses together under state law.

In view of the Supreme Court's decisions in *Turkette* and *Russello*, I therefore agree with our Court's expansive construction of RICO in sections II, III, IV and VII.

On the question of the admissibility of Ferritto's prior testimony in the three state trials, the existence of the "enterprise" element in RICO is not a bar to admissibility, as defendants argue, because the "enterprise" element, in light of the Supreme Court's holding in *Turkette*, has become a fiction. It has become synonymous with another element of the offense, namely, the "pattern of racketeering activity," *i.e.*, the two underlying state offenses. The "enterprise" element now adds nothing to the so-called "pattern" element. The two predicate offenses are the "enterprise." All that is now required for a RICO offense is the commission of two predicate offenses which the state defines as separately chargeable and separately punishable. No further indicia of "enterprise" is now necessary.

RULING OF THE UNITED STATES DISTRICT COURT ON POST VERDICT MOTION FOR ACQUITTAL

(Filed July 30, 1982)

CR79-103

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES T. LICAVOLI, *et al.*,
Defendants.

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

Defendant John P. Calandra moves after verdict for acquittal (Fed.R.Crim.P. §29(c)) and/or for a new trial (Fed.R.Crim.P. 33). Defendant John P. Calandra and the five other defendants (James T. Licavoli, Anthony Liberatore, Pasquale Cisternino, Ronald Carabbia, and Kenneth Ciarcia) have each been found guilty "as charged in the indictment".

The nature of the RICO conspiracy offense of which each was found guilty was thus defined in the court's final instructions:

> During [the stated period] and in violation of 18 U.S.C. §1962(d), the defendants and the persons named

as unindicted co-conspirators, are charged with combining, conspiring and agreeing together to violate 18 U.S.C. §1962(c), *i.e.*, that as associates in an enterprise to control the criminal activities in various cities in the Northern District of Ohio, by means of murder, bribery and other activities, they engaged in activities of an enterprise which affected interstate commerce.

[2-3] In this case, a conviction of the charged conspiracy therefore requires proof of agreement to commit each of two separate predicate acts, where a predicate act is defined as one of the acts defined by 18 U.S.C. §1961(1).[1]

Counsel's assumption that the section 1962(d) offense of conspiring to violate section 1962(c) can be broken down into two or more agreements, a premise that is essential to his quoted conclusion, is faulty. Conspiracy law contemplates only one agreement. As held in *United States v. Gutierrez*, 559 F.2d 1278, 1280 (5th Cir. 1978):

> [1] The essential elements of criminal conspiracy are *an agreement* to commit a crime followed by an overt act in furtherance of the agreement, *e.g., United States v. Barrera, supra; United States v. Isaacs*, 516 F.2d 409 (5 Cir.), *cert. denied*, 423 U.S. 936, 96 S.Ct. 295, 46 L.Ed.2d 269 (1975). There must be proof beyond reasonable doubt that *a conspiracy* existed, that the accused knew of it, and that the accused, with that knowledge, voluntarily became a part of it. *Barrera, supra*. [Emphasis added.]

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1. By arguing that section 1962(d) "requires proof of agreement to commit each of two separate predicate acts," defendant Calandra appears to be adopting this court's rulings of March 5 and June 3, 1982 that conspiracy is an act within the offenses set forth in section 1961(1).

United States v. Feola, 420 U.S. 671, 694 (1975), defines the unity of the agreement in socio-legal language:

> The law of conspiracy identifies *the agreement* to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for *the agreement* alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed. *United States v. Bayer*, 331 U.S. 532, 542 (1947). Criminal intent has crystallized and the likelihood of actual, fulfilled commission warrants preventive action. [Emphasis added.]

[4] In this court's memorandum and order of June 3, 1982, at p.9, this court held that "'conspiracy to murder' is classified as 'racketeering activity' under RICO." But the definition of "racketeering activity" in section 1961(1) neither expressly nor by implication requires that the "racketeering activity" which underlies a section 1962(d) conspiracy to violate section 1962(c) should be limited to predicate acts that are agreements to do the predicate act. Therefore, either an agreement (conspiracy) to do a predicate act identified in section 1961(1)(A)[2] or the commission of such a predicate act is within the contemplation of a section 1962(d) conspiracy to violate section 1962(c). Neither conspiracy law nor pertinent RICO statutory provisions requires the conclusion that only a conspiracy crime which comes within a section 1961(1) identified crime may serve as a predicate act in a section 1962(d) conspiracy to violate section 1962(c).

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2. This section includes "[a]ny act or threat involving murder, kidnapping and gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment by more than one year."

Counsel for defendant Calandra says that "the elements of the charged RICO conspiracy, 18 U.S.C. §1962 (d) . . . to *agree* (or conspire) to be employed by or associated with some enterprise . . . and to *agree* (or conspire) to further that enterprise by doing two of the predicate acts defined by 18 U.S.C. §1961(1)" have been "articulated in various forms by several courts." **[5]** A single sentence is quoted from *U.S. v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978):

> To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes.

As this court reads this *Elliott* language, the court is speaking of the agreement essential to establish a RICO enterprise conspiracy. Neither in this short quote nor in the pertinent language that follows it did the court say or suggest that in addition to such requisite agreement it is essential to show that a particular defendant "*agreed* to commit two predicate acts," as distinguished from the actual "commission of two such acts:"

> To achieve this result, Congress acted against the backdrop of hornbook conspiracy law. Under the general federal conspiracy statute,
>
> > the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. *Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 102, 87 L.Ed. 23 (1942).

In the context of organized crime, this principle inhibited mass prosecutions because a single agreement or "common objective" cannot be inferred from the commission of highly diverse crimes by apparently unrelated individuals. RICO helps to eliminate this problem by creating a substantive offense which ties together these diverse parties and crimes. Thus, the object of a RICO conspiracy is to violate a substantive RICO provision—here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity—and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity.

[6] *Id.* The court then held:

> *The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes.* Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. To find a *single conspiracy,* we still must look for agreement on an overall objective. What Congress did was to define that objective through the substantive provisions of the Act. [Emphasis added.]

Id. at 902-03. I conclude that this holding is incompatible with the argument that a RICO conspiracy requires proof of a separate agreement to commit each predicate act.

Abjuring an assessment that the RICO Act "punish[es] mere association with conspirators or knowledge

of illegal activity," and insisting that "[the Act's] proscriptions are directed against conduct, not status," the *Elliott* court declared:

> To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes*. One whose agreement with the members of an enterprise did not include this vital element cannot be convicted under the Act. Where, as here, the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement to do so is unmistakable.[3]

[7] *Id.* at 903. This language speaks only of one agreement that makes up the essential RICO conspiracy. Therefore, this court cannot construe *United States v. Martino*, 648 F.2d 367, 383 (5th Cir. 1981), to mean that *Elliott* requires proof of multiple agreements. Referring to the foregoing *Elliott* quote, the *Martino* court declared:

> A RICO conspiracy charge requires the additional element of agreement; the defendant must have "objectively manifested an agreement to participate, di-

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3. In its jury instructions this court required as proof of the existence of the charged RICO conspiracy more than *Elliott's* indication that by proof of "several acts of racketeering activity in furtherance of the enterprise's affairs" the "inference of an agreement" was "unmistakable." The first of the five elements of the RICO conspiracy required the government to prove that the conspiracy was "willfully formed," the defendant "knowingly agreed to become a member of the charged RICO conspiracy," a defendant or co-conspirator knowingly committed at least one overt act, "and that such overt act was knowingly done in furtherance of the conspiracy."

> rectly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes.*" *Elliott,* 571 F.2d at 903 (emphasis in original). *The Elliott court also stated that the agreement involved in a RICO conspiracy must include the vital element of agreeing to commit the predicate acts.* [Emphasis added.] Upon proof of the commission of racketeering activity, "the inference of an agreement to do so is unmistakable." *Id.*

Id. at 383.[4]

Later language of *Elliott* reiterated the court's position:

> Foster also had to know that the enterprise was bigger than his role in it, and that others unknown to him were participating in its affairs. He may have been unaware that others who had agreed to participate in the enterprise's affairs did **[8]** so by selling drugs and murdering a key witness. That, however, is irrelevant to his own liability, for he is charged with agreeing to *participate* in the enterprise through his own crimes, not with agreeing *to commit* each of the crimes through which the overall affairs of the enterprise were conducted.

Id. at 904.[5] The last sentence clearly says that in a RICO

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4. The *Martino* quote, when collapsed in *United States v. Marcello,* 537 F.Supp. 1364, 1379 (1982), as cited by counsel for defendant Calandra, loses its contextual meaning.

5. *U.S. v. Phillips,* 664 F.2d 971, 1038 (5th Cir. 1981), reiterated the *Elliott* "standard for approving the existence of a conspiracy in violation of 18 U.S.C.A. §1962(d)." *Phillips* next stated:

> As the quotation indicates, and as this Court stated in *United States v. Sutherland,* 656 F.2d 1181, 1187 n.4 (5th Cir. 1981), no actual acts of racketeering need occur; there

(Continued on following page)

conspiracy a defendant is not charged with agreeing to commit any of the predicate crimes.

Moreover, no language in *Elliott* or *Martino* states or suggests, as defendant Calandra argues, that in a section 1962(d) RICO conspiracy to violate section 1962(c) only a crime of conspiracy may constitute a **[9]** predicate act. Indeed, the predicate acts in *Elliott* included the non-conspiratorial crimes of "arson, activity assisting a car theft ring, . . . murdering a key witness, and dealing in narcotics;" and in *Martino* the predicate acts were acts of arson.

For the foregoing reasons, this court must respectfully reject defendant Calandra's "first argument." Hence, the court cannot accept his *a fortiori* conclusion that it was "substantial and plain error" when "the jury was not instructed that an agreement to commit two acts had to be found."

Footnote continued—

> need only exist a conspiracy to perform the necessary acts plus some overt action by one of the conspirators in furtherance of the conspiracy.

In n.4 of *Sutherland*, the court observed:

> Strictly speaking, the government need not have proven that two such acts were in fact committed. This case was not brought under the substantive RICO provisions, but is instead based on the defendants' conspiracy to violate such provisions.

Id. at 1187-88. While conceivably this court might have thus framed its instructions, it did not do so. Rather, this court required the government to prove as element 3 of its final jury instructions

> that the particular defendant under consideration engaged in a pattern of racketeering activity, as hereinafter defined, by knowingly and willfully committing, or knowingly and willfully aiding and abetting, at least two acts of racketeering activity.

II.

In the "second argument," entitled "Enterprise and Defendant's Association," the final portion of counsels' brief recognizes that they are reiterating arguments previously made and overruled by this court. The court reaffirms the rulings previously made. However, ground 4 of defendant Calandra's motion presents an argument not previously ruled upon prior to verdict. It states:

> The jury was allowed to receive the former testimony of government witness Raymond W. Ferritto on repeated occasions despite his absence and the lack of opportunity to cross-examine that witness on the essential issue of RICO enterprise.

At no point in their brief do counsel for defendant Calandra elaborate upon this ground. This court has dealt with a similar ground of error in ruling on defendant Licavoli's post-verdict motion for acquittal (incorporated by reference by defendant Calandra as the tenth and final ground of his motions). While there is no need **[10]** to repeat any portion of this court's Licavoli ruling as to the claimed "lack of opportunity to cross-examine [Ferritto] on the essential issue of RICO enterprise," the cross-examination of Ferritto by counsel for defendant Calandra at his state murder trial is instructive.

As to the meetings in 1976 attended by Raymond W. Ferritto and Anthony "The Dope" Delsanter, and those in 1976 attended by Ferritto, Delsanter, James T. Licavoli, Pasquale Cisternino and Ronald Carabbia, counsel for Calandra asked only questions to establish that John Calandra was not present at any of those meetings. It is unlikely that he would have interrogated substantially differently if he had also faced the enterprise issue at that time.

With reference to the April 1977 meeting, Raymond Ferritto said it occurred in Warren, Ohio at either the The Living Room or Cherry's. Raymond Ferritto identified those at the meeting as himself, Delsanter, Cisternino, Carabbia and Calandra. Asked what happened at the meeting, Ferritto testified:

> I asked about what was happening and if the deal that we had made was still good, and was told by both Calandra and Delsanter that it was.

Further he was asked if he had any conversation with John Calandra, and he answered:

> Yes. He said there were people calling from different parts of the country about what was—what happened to Leo Moceri and that something had to be done.

Counsel for Calandra dealt with the subject matter of this meeting cautiously and briefly. He did not **[11]** ask directly about Calandra's participation in that meeting. Instead, he put the question, "But it was Delsanter who told you the deal was still on as you have indicated, right?" Ferritto answered, "Yes, sir. We were all at the table. Yes, sir." Although this meeting and its content bear on the enterprise issue, limited cross-examination by counsel for defendant Calandra, seeking to minimize Calandra's part in the meeting, suggests that a similar approach would have been taken had the RICO enterprise issue been one of the issues in the state murder trial.

It is concluded that the motive to develop testimony by cross-examination at the state murder trial, *i.e.*, the motive of minimizing defendant Calandra's involvement with Ferritto and the acts he was to commit, was similar to the motive to develop the present issue of enterprise.

It is not likely that counsel for defendant Calandra would have conducted a more searching cross-examination with reference to the April 1977 meeting or to any other of the numerous meetings that Raymond Ferritto stated that he had with John Calandra. Hence, it is concluded that defendant Calandra's right of confrontation was not violated by the admission of the prior record testimony of Raymond Ferritto.

Defendant Calandra's post-verdict motion for acquittal and his motion for a new trial are respectfully overruled.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Senior Judge

RULING OF THE UNITED STATES DISTRICT COURT ON MOTION FOR JUDGMENT FOR ACQUITTAL

(Filed June 3, 1982)

CR79-103

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES T. LICAVOLI, *et al.*,
Defendants.

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

Pursuant to Fed.R.Crim.P. 29(a), defendant Licavoli moves for a judgment of acquittal. After study of the motion and supporting brief filed on May 19, this court determines that legal, not evidentiary issues, are presented. Hence, the court need not await the closing of the government's presentation of evidence to consider and rule upon the serious legal issues raised by defendant Licavoli.

I.

Defendant Licavoli contends that the alleged conspiracies to kill Daniel Greene and John Nardi cannot be considered as predicate acts under 18 U.S.C. §1961. De-

fendant argues that "the legislative history of section 1961 . . . demonstrates beyond doubt that Congress decided not to include the crime of conspiracy as a separate act of racketeering." Defendant does not cite any **[2]** legislator's statement. Rather he refers to the absence in the law's final language of conspiracy provisions contained in two Senate bills, S.1623 and S.1861. Title IX of the Organized Crime Control Act of 1970 (Chapter 96 - "Racketeer Influenced Corrupt Organizations" of 18 U.S.C. §901(a)) was substituted for these bills.

S.1623 (authored by Senator Hruska, R. Neb.) was introduced on March 20, 1969 as a possible amendment to Title 18 of the United States Code. The amendment sought to control the infiltration of legitimate business by criminals through the investment of money gained through criminal activities. Named the "Criminal Activities Profits Act," the bill defined "criminal activity" as:

> (A) any act involving murder, kidnapping, extortion, bankruptcy fraud, or the manufacture, importation, receiving, concealment, buying, or otherwise dealing in narcotic drugs or marihuana which is punishable under any statute of the United States;
>
> (B) any act which is punishable under [any of a number of enumerated provisions of] title 18, United States Code; and
>
> (C) any conspiracy to commit any of the foregoing offenses.

On April 18, 1969, S.1861 was introduced by Senator McClellan (D. Arkansas). S.1861, broader in scope than S.1623, also sought to control the investment of illegally obtained funds. Cited as the "Corrupt Organizations Act of 1969," S.1861 stated that its purpose was:

To amend title 18, United States Code, to prohibit the infiltration or management of legitimate organizations by racketeering activity or the proceeds of racketeering activity, where interstate or foreign commerce is affected, and for other purposes.

[3] Section 1961 of S.1861 defined "racketeering activity:"

(1) The term "racketeering activity" means (A) any act involving the danger of violence to life, limb, or property, indictable under State or Federal law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following [cited] provisions of title 18, United States Code; and (C) any conspiracy to commit any of the foregoing offenses.

As enacted into law and signed by the President on October 15, 1970, section 1961(1) of the "Racketeer Influenced and Corrupt Organizations" Act defines "racketeering activity" as:

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

(B) any act which is indictable under any of the following provisions of title 18, United States Code: (enumerated provisions follow);

(C) any act which is indictable under title 29, U.S.C., section 186 . . . or section 501(c) . . .; or

(D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or (various drug offenses).

Thus, as enacted, section 1961(1) omitted subdivision (c), the conspiracy catch-all provision contained in both S.1623 and S.1861. Defendant Licavoli argues that this is a "delet[ion]" that "plainly demonstrates Congress's intention not to make conspiracy a separate act of racketeering."

The legislative history does not reflect or refer to the dropping of the conspiracy provisions of S.1623 and S.1861. However, the Senate legislative history chronicles the replacement of the S.1861 wording of **[4]** section 1961(1)(A) (including the conspiracy provision) with language proposed to the Senate Judiciary Subcommittee on Criminal Laws and Procedures by the Department of Justice.

In a letter of August 11, 1969, Richard G. Kleindienst, Deputy Attorney General of the United States, responded to the subcommittee's request for the Department of Justice's views on S.1861. In his letter, Mr. Kleindienst stated:

> Section 1961 is a definition section containing the definition of such terms as racketeering activity, interstate commerce, State, person, enterprise, pattern of racketeering activity, unlawful debt, racketeering order, racketeering investigation, racketeering violation, racketeering investigator, and documentary material.
>
> It is felt that the definition of the term "racketeering activity" contained in Section 1961(1)(A), any act involving the danger of violence to life, limb, or property indictable under state or Federal law and punishable by imprisonment for more than one year is too broad and would result in a large number of unintended applications as well as tending towards

complete federalization of criminal justice. It is suggested therefore that Section 1961(1)(A) be redefined as follows:

> (1) The term "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, usury or dealing in narcotic drugs, marihuana or other dangerous drugs which is indictable under State law and punishable by imprisonment for more than one year.[1]

In his criticism of S.1861, Mr. Kleindienst did not mention the conspiracy provision. Nor did he discuss [5] any federal criminal statute which might be a predicate for "racketeering activity." Instead, he dwelt on the Department's concerns about the wording of section 1961(A) as it related to state crimes as predicates for "racketeering activity." The Department of Justice expressed the feeling that the language "any [indictable] act involving the danger of violence to life, limb, or property" was "too broad and would result in a large number of unintended applications." The Department saw this as tending "towards [a] complete federalization of criminal justice."

The Senate Judiciary Committee on January 21, 1970 brought S.30 to the Senate floor. Portions of S.1861 had been incorporated into S.30 to comprise Title IX of this omnibus bill which became the Organized Crime Control Act of 1970. With reference to Title IX, Senator McClellan, the principal author and proponent of the bill, told the Senate on that day:

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1. **Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee of the Judiciary, United States Senate on Measures Relating to Organized Crime, 91st Cong., 1st Sess. Vol. 4, p.405 (1969).**

> The subcommittee and the full committee have now agreed with the Department of Justice on their suggested revisions and, along with other improving amendments have approved Title IX.

See 116 Cong. Rec. 36,295 (10/12/70). Senator McClellan was obviously referring to the revisions suggested by Deputy Attorney General Kleindienst in his letter of August 11, 1969. A comparison of the Department of Justice's suggested revisions with section 1961(1) of S.30 shows that the Senate Judiciary Committee adopted the Department's substitute language with only three changes. The crime of "usury" was deleted from the **[6]** list of state crimes; the words "drugs, marihuana" were deleted to make the phrase read "narcotic or other dangerous drugs;" and "chargeable under state law" was substituted for "indictable under state law."

Without any further change in the wording of Title IX section 1961(1), S.30 was passed by the Senate on January 23, 1970. Similarly, no change in this language occurred in the House, although amendments to other titles of S.30 were made by the House. The House passed S.30 on October 7, 1970. On October 12, 1970 the Senate determined to accept the House amendments and passed S.30 on the same day. The President signed the bill into law on October 15, 1970.

In this court's memorandum and order of March 5, 1982 it determined that

> Section 1961(1)(A) relating to crimes chargeable under state law speaks of "any act or threat *involving* murder, kidnapping, gambling. . . ." (Emphasis added.) The subsection does not say "any act or threat of murder. . . ." The term "involving" suggests a broader scope and an intent to include other acts in addition

> to the substantive crime. This broad reading of an "act" includes the crime of conspiracy. . . .

The Department of Justice suggested the broad words "any act . . . involving" as part of the substitute language for section 1961(1)(A) while it made no reference to the dropping of the conspiracy provision (subsection (c)). There also is no reference to the dropping of the conspiracy provision in the Senate Report[2] in which the Department's suggested section 1961(1)(A) language [7] is approved and adopted. No inference, therefore, that the Senate intended to exclude conspiracy acts, criminal under state law, from section 1961(1)(A) may reasonably be made. To the contrary, it is reasonable to infer that the Department and the Senate Judiciary Committee concluded that incorporation of the words "any act . . . involving" intended a scope broader than the substantive crime, thus including "conspiracy to murder, kidnap, etc."

Immediately after suggesting a substitute section 1961(1)(A), Deputy Attorney General Kleindienst explained:

> It is felt that by thus narrowing the definition of the class of applicable state crimes in terms of their generic meaning, the definition of "racketeering activity" contained in Section 1961(1)(A) will be both broad enough to include most state statutes customarily invoked against organized crime, yet narrow enough to be constitutional. *United States v. Nardello,* 393 U.S. 286 (1969).

The key to interpreting the proposed language, later adopted into S.30 and enacted into law, is Mr. Kleindienst's suggestion that the new language would narrow the definition of the "class of applicable state crimes in terms of their generic meaning." Thus defined, the "definition of

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2. See S.Rep. No. 91-617, 91st Cong. 1st Sess, p.121 (1969).

'racketeering activity' contained in section 1961(1)(A)" is "broad enough to include most state statutes customarily invoked against organized crime." When each of the enumerated state crimes is given its "generic meaning," the particular crime, *e.g.*, "murder," relates to or is "descriptive of [its] entire group or class; general . . ." *American Heritage Dictionary* (1969), p.549. Given its generic meaning, the "group or class" of the Ohio [8] crime of murder embraces "conspiracy to murder" as well as the substantive crime of murder.

The Senate's adoption of suggested substitute section 1961(1)(A) and inclusion of the "state offenses by generic designation" is exhibited in the Senate Report's close tracking of the Kleindienst letter in the section-by-section analysis of the Organized Crime Control Act:

> Section 1961 contains definitions.
>
> Subsection (1) defines "racketeering activity" to include those crimes most often associated with organized crime especially those associated with the infiltration of legitimate organizations. Those crimes are murder, kidnapping, gambling, arson, bribery, extortion, narcotic violations, counterfeiting, usury, mail, bankruptcy, wire and securities fraud, and obstruction of justice. The state offenses are included by generic designation, *Cf. United States v. Nardello*, 393 U.S. 286, 292 (1969). The Federal offenses are included by specific reference. The term "racketeering activity" is a key statutory term. Under proposed section 1962, below, the racketeering activity is one of three prerequisites to commission of an offense. If there is no racketeering activity, there can be no violation of the provisions of this title.

S.Rep. No. 91-617, 91st Cong. 1st Sess. at p.158 (1969).

Moreover, it is evident that a conspiracy statute is one which a state may invoke "against organized crime," a stated purpose of substituted section 1961(1)(A). As stated by the Senate:

> It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. See Organized Crime Control Act, P.L. 91-452, "Statement of Findings and Purpose."

The statute further provides that:

> **[9]** The provisions of this title shall be liberally construed to effectuate its remedial purposes. See P.L. 91-452, Sec. 904(a), at 1970-1, U.S. Code Cong. & Admin. News, 2nd Sess., at p.1104.

Hence it is concluded that conspiracy to commit one of the section 1961(A)(1) proscribed acts "is chargeable under State law and punishable by imprisonment for more than one year."[3] "Conspiracy to murder" is **[10]** classified as "racketeering activity" under RICO.

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3. Defendant Licavoli cites *United States v. Weisman*, 624 F.2d 1118 (2nd Cir. 1980), as additional support for his argument. In *Weisman*, the Second Circuit held that "conspiracy [could] properly be charged as a predicate act of racketeering under RICO, at least when it involves any of the substantive offenses listed in section 1961(1)(D)." *Id.* at 1123. In reaching its decision, the Second Circuit referred to the deletion of the early drafts' conspiracy language from the final version of section 1961. The court stated:

> Thus, the alterations of section 1961(1) are most logically interpreted as an attempt to restrict the conspiracies chargeable as predicate offenses to those involving offenses listed in subsection (D).

Id. at 1124. Defendant Licavoli argues that under *Weisman*, section 1961(1)(A) cannot include conspiracy offenses.

(Continued on following page)

II.

Relying on the Ohio conspiracy statute, section 2923.01(F), defendant Licavoli argues, "This statute mandates the conclusion that any conspiracy here to kill *Greene and Nardi* simply cannot be fragmented into two (2) predicate acts by the government in its quest for a RICO conspiracy conviction." Before examining section 2923.01(F), defendant Licavoli's argument needs to be placed in the context of the RICO conspiracy charge which is on trial.

Defendants are charged with a violation of 18 U.S.C. §1962(d), which reads as follows:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Footnote continued—

In reaching its determination, the Second Circuit compared the language of subsection D to that used in subsections B and C of section 1961(1). Sections B, C and D all deal with federal crimes. Thus, the Second Circuit was impressed by the use of "any offense involving" in subsection D as opposed to the use of "any act which is indictable under [specific sections of the United States Code]" in subsections B and C. The court concluded that subsections B and C "require that the [charged] act be indictable under specifically enumerated sections of the [federal] criminal code." *Id.* at 1124.

However, the Second Circuit's ratio decidendi does not extend to subsection A. *Weisman* did not involve any alleged conspiracy acts under section 1961(1)(A). Indeed, the court did not expressly examine the legislative history chronicled in Part I, *supra;* nor did it specifically analyze or address the scope and breadth of subsection A. Subsection D deals with "acts or threats involving" designated state crimes chargeable and punishable under State law. *Weisman* was decided solely in a federal context. Thus, as recognized in *United States v. Welch*, 656 F.2d 1039, 1063, n.32 (5th Cir. 1981), *Weisman* did not settle the issue of "whether a charge of conspiracy to murder is a proper predicate act for a RICO charge."

Section (c), the applicable substantive provision, provides:

> It shall be unlawful for any person employed or associated with any enterprise engaged in or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

A " 'pattern of racketeering activity' requires at least two acts of racketeering activity. . . ." 18 U.S.C. §1961(5). "Racketeering activity" is defined to include

> any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year.

18 U.S.C. §1961(1)(A).

[11] The indictment charges that defendant Licavoli (and likewise defendants Calandra, Cisternino and Carabbia) committed three predicate acts chargeable under state law: conspiracy to murder Nardi, conspiracy to murder Greene, and the murder of Greene. Defendant Licavoli questions whether a conspiracy to murder Nardi and a conspiracy to murder Greene are separately "chargeable under State law" and "punishable by imprisonment for more than one year." Defendant Licavoli argues that under division (F) there exists here only one conspiracy, not separate conspiracies to murder Greene and to murder Nardi.

O.R.C. §2923.01(F) reads:

> A person who conspires to commit more than one offense is guilty of only one conspiracy, when such

> offenses are the object of the same agreement or continuous conspiratorial relationship.

Division (F) is explained in the Committee Comments to the law as enacted as part of the revision of Ohio's criminal code, effective January 1, 1974:[4]

> This section states that even though a conspiracy may include plans to commit more than one offense, it is still one conspiracy when these offenses are part of the same plan, agreement, or continuous conspiratorial relationship.

No reported Ohio case has considered or applied the concept set forth in division (F).

In *Braverman v. United States,* 317 U.S. 49 (1943), the issue was

> **[12]** [w]hether a conviction upon the several counts of an indictment, . . . where the jury's verdict is supported by evidence of but a single conspiracy, will sustain a sentence of more than two years' imprisonment, the maximum penalty for a single violation of the conspiracy statute. . . .

The defendant had been charged with conspiracy to violate several different provisions of the Internal Revenue laws. The Court held that when a single agreement is the prohibited conspiracy, only a single penalty may be imposed. The following reasoning is important:

> For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and

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4. The only change in the 1976 amendment was to include certain crimes involving narcotics. The language of division (F) was not amended.

> extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. *Whether the object of a single agreement is to commit one or many crimes, it is in either case that aggreement which constitutes the conspiracy which the statute punishes.*
>
> • • • • •
>
> Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes.

Id. at 53-54.

Similarly, in *United States v. Adcock*, 487 F.2d 637 (6th Cir. 1973), the court held that where a defendant is charged with conspiring to violate two separate statutory provisions but the case involves "a single conspiracy having as its ultimate purpose the violation of more than one substantive offense," *id.* at 639, it is error to sentence the defendant on both counts. The test is whether "despite the fact that defendants may have had more than one illegal objective . . . only **[13]** a single agreement existed among the defendants and the other conspirators to commit these unlawful acts." *Id.* at 639.

While this court must look to the state criminal law to ascertain the nature of the crime of conspiracy underlying the predicate acts charged under state laws, it is manifest that a limitation on the law of conspiracy is recognized by the federal courts and that this limitation coincides with the express language of section 2923.01(F). Thus, it is essential to look at the facts presented in this case to see whether there is evidence of only one agree-

ment to kill Nardi and Greene or of separate agreements to kill each man.[5]

The testimony of Raymond J. Ferritto in the three state proceedings as read into evidence in this case tends to show that three meetings were held in the late spring and summer of 1976. The first meeting was with Jimmy Fratianno at the Town and Country Motel in Warren, Ohio in May of 1976. Fratianno told him that "they were having some problems in Cleveland and that he thought [Ferritto] should talk to Tony DelSanter, and that maybe [Ferritto] could make some money with him." Ferritto described further his conversation with Fratianno:

> **[14]** He said they were having problems there, and that somebody was trying to hussle in, and that Tony might have some work for me and I might make some money with him.

When asked what "work" meant, Ferritto responded, "I took it to mean that he wanted somebody taken care of . . . Somebody killed."

"A couple of weeks later" Fratianno called Ferritto again to arrange a meeting in Warren with DelSanter. Ferritto described the subsequent meeting at Cherry's restaurant:

> We exchanged greetings, and we sat down, and Fratianno said, you guys have something to talk about . . . and he left.

* * * * *

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5. The testimony of Raymond J. Ferritto will be considered as it goes to the issue currently before the court. The court is not suggesting that the testimony is applicable only to this issue; indeed, it may be relevant to the federal RICO conspiracy charge.

[DelSanter] asked me if Fratianno had told me about the problems that they were having, and I told him just that he said that someone was trying to muscle in on the gambling in Cleveland. But he didn't say who.

And so DelSanter went on and told me that the two fellows were Nardi—John Nardi and Greene, from Cleveland, and they were muscling in on the gambling operations in Cleveland. And that he wanted them—something had to be done with them, that they had to be taken care of. And if I was interested.

Q: Did you say anything?

A: I said that I was interested, but I wanted to know what was in it for me. And he said that he would have to ask Jack, Jack White, he said, because he's the boss.

Q: Do you know who Jack White is?

A: Yes.

Q: Does he go by any other name?

A: Licavoli.

[15] "Two or three weeks later," Ferritto received a telephone call from Ronald Carabbia telling him to attend a dinner meeting at Cherry's the next night. Ferritto testified that he "met Cisternino, Carabbia, Tony DelSanter [and] Jack White" at the restaurant. He related the following about the conversation:

Tony DelSanter told Jack that I was interested in the work, and that I wanted to know what monetary returns I would get.

Q: Did Jack say anything to you?

A: He said that I would be taken care of.

• • • • •

Q: In regards to the work that you were considering doing, did they discuss that matter any further with Mr. White and the other people at the table?

A: Yeah, I accepted the terms, and I said that when they got the—when they were ready, to call me. When they got the legwork done to call me.

The clear import of the Ferritto testimony is that he was hired to "take care of" the people "muscling in" on the Cleveland gambling operations. That "work" would involve the killing of Greene and Nardi.

This court finds that the facts offered through the Ferritto testimony support defendant Licavoli's argument that there exists here a single agreement, a single conspiracy to murder. As part and purpose of that agreement, several acts of murder would be committed. However, "it is . . . [the] agreement which constitutes the conspiracy which the statute punishes," *Braverman,* 317 U.S. at 53; and this court holds that on the facts of this case only a single agreement can be shown to have existed.

[16] Under such circumstances, O.R.C. §2923.01(F) permits defendant Licavoli, and indeed all of the defendants, to be charged with only a single conspiracy. The agreement cannot be bifurcated to permit separate conspiracy charges for each of the alleged targets. Since under the evidence as read most favorably for the prosecution the defendants could not be charged under state

law with separate conspiracies to murder Nardi and to murder Greene, those individual conspiracies may not be used as separate predicate acts to support an 18 U.S.C. §1962(d) conspiracy charge.

As a question of law, this court concludes that the alleged predicate acts of conspiracy to murder Nardi and conspiracy to murder Greene must be treated as one conspiracy to murder. The jury will be appropriately instructed on the following subject. As an element of the RICO conspiracy, the jury must determine that as to defendants Licavoli, Calandra, Cisternino and Carabbia each committed the following two predicate acts: (1) conspired to murder Daniel Greene and/or John Nardi; and (2) murdered, or aided and abetted in the murder of, Daniel Greene.

As to defendants Liberatore and Ciarcia, the jury will be instructed that it must determine that each committed two of the following predicate acts: (1) conspired to murder Daniel Greene; (2) murdered, or aided and abetted in the murder of, Daniel Greene; (3) in or about October 1977, gave things of value, including approximately $14,900, more or less, to **[17]** Geraldine Rabinowitz, also known as Geraldine Linhardt, an employee of the Federal Bureau of Investigation of the U.S. Department of Justice, in violation of 18 U.S.C. §201(b)(3).

III.

Defendant Licavoli further argues that the government cannot fragment

> a unified conspiracy (—that is, to kill Greene and Nardi), which charge, by force of §2923.01(G) upon conviction would merge into the substantive murder offense involving Greene, into more than one pred-

icate act so as to accommodate the RICO charge made in this indictment.

O.R.C. §2923.01(G) reads:

> When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

In essence defendant Licavoli is arguing that because division (G) requires that the conspiracy and substantive charges merge upon conviction of the substantive offense, conspiracy to murder and murder cannot be set forth as separate predicate acts.

Defendant Licavoli's argument would be applicable if he was being prosecuted in a state court of Ohio for conspiracy to murder after conviction for the substantive offense of murder. But it is pertinent to repeat what was said in another context in this court's memorandum and order of March 5, 1982:

> This criminal prosecution is for the violation of a federal criminal statute. The defendants have not been charged with commission of the state crimes; they cannot be convicted of the state crimes. The state crimes referred to are definitional only. *United States v. Frumento*, 563 F.2d 1083 (3rd Cir. 1977), *cert. denied sub nom. Millhouse v. United States*, 434 U.S. 1072 (1978).

[18] Previously in *United States v. Forsythe*, 560 F.2d 1127 (3rd Cir. 1977), the Third Circuit had explained the incorporation of state criminal offenses for "definitional purposes," stating:

> RICO is a federal law proscribing various racketeering acts which have an effect on interstate or foreign commerce. Certain of those racketeering, or predicate acts violate state law and RICO incorporates the elements of those state offenses for definitional purposes. *State law offenses are not the gravamen of RICO offenses. RICO was not designed to punish state law violations;* it was designed to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity. *To interpret state law offenses to have more than a definitional purpose would be contrary to the legislative intent of Congress and existing state law.*

Id. at 1135 (emphasis added).

Similarly in *United States v. Malatesta*, 583 F.2d 748, 758 (5th Cir. 1978), *cert. denied sub nom. Bertolotti v. United States*, 440 U.S. 962 (1979), the court repeated prior Fifth Circuit determinations that "the reference to state law in the federal statute is for the purpose of defining the *conduct* prohibited. . . ."

The present question is whether the predicate acts set forth in the indictment, the conspiracy to murder and the murder, are "chargeable," *i.e.*, defined, under state law. Clearly in two separate counts of an indictment a person can be charged in Ohio with conspiracy to commit an offense and the substantive offense. There is nothing in state law that requires a prosecutor to elect between the substantive offense and the conspiracy. Rather section 2923.01(G) requires a merger of the charges only upon *conviction*. Because **[19]** defendants here will not be *convicted* of the state law crimes, the bar of division (G) is not applicable. Division (G) operates either

to bar double sentences, as stated by this court in its March 5, 1982 memorandum and order, or to bar successive prosecutions for conspiracy and the substantive offense. It has no effect on the *charging* of a defendant with certain crimes. Nor does section 2923.01(G) constitute any of the elements of the offense of "conspiracy to murder" under Ohio law which the United States must prove to establish a predicate act.

The laws of Ohio define the crimes of conspiracy to commit murder and murder. Thus these crimes are separately "chargeable under State law." Therefore, it is concluded that conspiracy to murder and murder may be set forth as separate predicate acts in a RICO substantive charge (section 1962(c)) and thus in a RICO conspiracy charge (section 1962(d)).

Defendant Licavoli's motion for acquittal is denied as to all grounds asserted in his supporting brief.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Senior Judge

RULING OF THE UNITED STATES DISTRICT COURT ON MOTION TO INCLUDE STATE COURT ACQUITTAL IN FEDERAL RECORD

(Filed March 11, 1980)

CR79-103

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v

JAMES T. LICAVOLI, *et al.*
Defendants.

ORDER

THOMAS *J.*

The October 18, 1979 motion of defendant John Calandra to supplement the record by including a certified copy of the judgment of acquittal of aggravated murder and aggravated arson entered by the Common Pleas Court of Cuyahoga County is hereby granted *nunc pro tunc* as of October 18, 1979.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Judge

CERTIFIED JUDGMENT OF ACQUITTAL OF THE COURT OF COMMON PLEAS

(Dated October 25, 1978)

No. CR-38130

IN THE COURT OF COMMON PLEAS

INDICTMENT

Aggravated Arson w/ct Aggr. Murder w/specs. w/ct Engage in Organized Crime

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STATE OF OHIO,
Plaintiff,

vs.

JOHN CALANDRA,
Defendant.

JOURNAL ENTRY

This day again comes the Prosecuting Attorney on behalf of the State and defendant, John Calandra was brought into Court, represented by counsel.

Now comes the Jury, conducted into Court by the Bailiff and returned the following verdicts in writing, to-wit: "We, the Jury being duly impaneled and sworn, do find the defendant, John Calandra, Not Guilty of Aggravated Arson, as charged in the first count of the indictment." and "We, the Jury do find the defendant, John Calandra, Not Guilty of Aggravated Murder with Specifications, (1+2), as charged in the second count of the indictment."

(Third count dismissed)

Thereupon, the Court informed the defendant of the verdict of the Jury.

Defendant, John Calandra discharged in this case.

/s/ N. A. FUERST
Judge

RULING OF UNITED STATES DISTRICT COURT ON MOTION TO DISMISS ON GROUND OF PRIOR STATE COURT ACQUITTAL

(Filed October 10, 1979)

CR79-103

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES T. LICAVOLI, *et al.*,
Defendants.

MEMORANDUM AND ORDER

THOMAS *J.*

On October 6, 1977, Daniel Greene was killed when a car parked next to his in a parking lot exploded as he was entering his car. In connection with that death, several individuals, including defendants in this action Licavoli, Cisternino, Carabbia, and Calandra, were indicted on December 5, 1977 by a state grand jury for aggravated arson;[1]

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1. Ohio Rev. Code §2909.02:

(A) No person, by means of fire or explosion, shall knowingly:

(1) Create a substantial risk of serious physical harm to any person;

(2) Cause physical harm to any occupied structure;

(Continued on following page)

[2] aggravated murder, with specifications;[2] engaging in organized crime;[3] conspiracy to commit aggravated murder,

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Footnote continued—

(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of serious physical harm to any person or of physical harm to any occupied structure.

(B) Whoever violates this section is guilty of aggravated arson, a felony of the first degree.

2. Ohio Rev. Code §2903.01:

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Specifications are defined in Ohio Rev. Code §2929.04(A), and were prerequisites to the imposition of the death penalty. Ohio's death penalty scheme, however, was effectively scrapped by the Supreme Court in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Bell v. Ohio*, 438 U.S. 637 (1978).

3. Ohio Rev. Code §2923.04:

(A) No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:

(1) Organize or participate in organizing a criminal syndicate or any of its activities;

(2) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;

(3) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;

(4) Furnish legal, accounting, or other managerial services to a criminal syndicate;

(5) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

(Continued on following page)

[3] and to commit aggravated arson.[4] These same in-

Footnote continued—

(6) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of violence;

(7) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of section 2921.03 of the Revised Code.

(B) Whoever violates this section is guilty of engaging in organized crime, a felony of the first degree.

(C) As used in this section, "criminal syndicate" means five or more persons collaborating to promote or engage in any of the following on a continuing basis:

(1) Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revised Code;

(2) Compelling or promoting prostitution, or procuring in violation of section 2907.21, 2907.22, or 2907.23 of the Revised Code;

(3) Any theft offense as defined in section 2913.01 of the Revised Code;

(4) Any gambling offense as defined in section 2915.01 of the Revised Code;

(5) Illegal trafficking in drugs of abuse, in intoxicating or spirituous liquor, or in deadly weapons or dangerous ordnance as defined in section 2923.11 of the Revised Code;

(6) Lending at usurious interest, and enforcing repayment by illegal means;

(7) Any offense, for the purpose of gain.

(D) A criminal syndicate retains its character as such even though one or more of its members does not know the identity of one or more other members, and even though its membership changes from time to time.

4. Ohio Rev. Code §2923.01, which provides in part:

(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, corrupting another with drugs, trafficking in drugs, theft of drugs, or illegal processing of drug documents shall do either of the following:

(1) With another person or persons, plan or aid in planning the commission of any such offense;

(Continued on following page)

dividuals, except Raymond Ferritto, were indicted by a federal grand jury [4] on January 6, 1978 for conspiring to violate 18 U.S.C. §1962(c) in violation of 18 U.S.C. §1962(d).[5]

On March 7, 1978, another group of individuals, including defendants in this action Lanci, Ciarcia, and Liberatore, were indicted by a state grand jury for aggravated [5] murder, with specifications, aggravated arson, and engaging in organized crime, also in connection with the death of Daniel Greene. In March 1978, a complaint charging defendant Lanci with a violation of 18 U.S.C. §1962(d) was issued by a federal magistrate. Although a preliminary hearing was held on March 7, 1978 and defendant Lanci was bound over to the grand jury, he was not indicted until the present indictment was handed down in May 1979.

Defendants Licavoli, Cisternino, and Carabbia were tried on the state charges in February through May 1978. The state court had earlier dismissed both conspiracy charges against defendants Licavoli, Cisternino, Carabbia, and Calandra upon a motion by the state. Defendant

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Footnote continued—

(2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commission of any such offense.

5. These statutes are part of a group of statutes that are collectively entitled "Racketeer Influenced and Corrupt Organizations," commonly referred to by their acronym, RICO. They provide:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Licavoli was acquitted of all other charges; defendants Cisternino and Carabbia were acquitted of engaging in organized crime and of the second specification under the aggravated murder count (that the murder was committed for hire), but were convicted of aggravated arson, aggravated murder, and of the first specification (that the murder was committed in the course of committing aggravated arson).

Defendants Calandra, Ciarcia, and Lanci were tried in state court in June, July and August 1978.[6] The trial judge [6] ordered a judgment of acquittal on the organized crime charge. Defendant Calandra was acquitted of the other charges. Defendants Ciarcia and Lanci were convicted of aggravated murder, but acquitted of the specifications and of aggravated arson.

The federal indictment was voluntarily dismissed by the United States on September 7, 1978. The dismissal occurred during the pretrial stage of the case but just shortly before the scheduled trial date.

On May 3, 1979, the present indictment was handed down charging defendants with a conspiracy to violate 18 U.S.C. §1962(c), in violation of 18 U.S.C. §1962(d); a conspiracy to violate 18 U.S.C. §201(b)(3), in violation of 18 U.S.C. §371;[7] [7] and two violations of 18 U.S.C. §201(b)

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6. Defendant Calandra was ordered severed from the trial of defendants Licavoli, Carabbia and Cisternino on February 21, 1978 apparently because of illness. Defendant Liberatore has not yet been tried on the state charges.

7. Section 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(Continued on following page)

(3). All the charges directly or indirectly grow out of the same facts that formed the basis for the state charges.

Defendants Licavoli, Calandra, Lanci, Cisternino, Carabbia, and Ciarcia have filed motions to dismiss the indictment on several grounds. Because of a defendant's right to immediately appeal an adverse ruling on a double jeopardy claim, *see Abney v. United States*, 431 U.S. 651 (1977), the court proposed to rule first on defendants' claim of double jeopardy (also called *res judicata* or collateral estoppel). Other related arguments in support of the motions to dismiss the indictment have been made, however, and these too will now be considered by the court. They are: (1) the government's *Petite* policy has been violated; (2) the indictment is the result of a bad faith investigation and prosecution; and (3) 18 U.S.C. §1962 is an assimilative statute that precludes conviction after prior acquittal on charges under the assimilated state law. The court will deal with each contention in turn.

Footnote continued—

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 201(b)(3) provides:

> Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent -
>
> • • • • •
>
> (3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, . . .
>
> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

[8] I.

Double Jeopardy

Defendants claim that this prosecution is barred by the double jeopardy clause of the fifth amendment to the United States Constitution because they have previously been tried in state court on similar charges arising out of the same set of facts that form the basis for the federal prosecution, and there was extensive participation in the state prosecution by federal authorities. Although the arguments differ somewhat from defendant to defendant, the court will treat the issue generally, dealing with specific arguments only when they raise separate issues.

Several defendants' contentions notwithstanding, this court finds it clear that the fifth amendment does not preclude prosecution in a federal court after a defendant has stood trial in state court for the same acts:[8]

[9] In *Bartkus v. Illinois*, 359 U.S. 121, and *Abbate v. United States*, 359 U.S. 187, this Court reaffirmed

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8. The charges against defendants under state law are not identical to those under federal law. For example, the defendants were never charged in state court with bribery of a federal employee, although apparently the state introduced the alleged incidents of bribery as part of its proof of the other charges. For this additional reason, the argument that the bribery and conspiracy to bribe counts are barred by the double jeopardy clause lacks foundation.

Likewise, the elements that must be proved under the RICO count differ from the elements under Ohio's "organized crime" statute. For example, the definitions of "criminal syndicate" and "enterprise" engaged in a "pattern of racketeering activity" contain some common but some different elements, and under RICO a nexus with interstate commerce must be shown. Although both statutes may arguably be aimed at "organized crime" in the popular sense of the term, as a legal matter they are not coextensive nor does one subsume the other. Thus, even aside from the dual sovereignty doctrine, defendants have not previously been charged with the same offense. See *United States v. Johnson*, 516 F.2d 209 (8th Cir.), *cert. denied*, 423 U.S. 859 (1975).

the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy":

"An offence, in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Moore v. Illinois*, 14 How. 13, 19-20.

* * * * *

Bartkus and Abbate rest on the basic structure of our federal system, in which States and the National Government are separate political communities. State and Federal Governments "[derive] power from different sources," each from the organic law that established it. *United States v. Lanza*, 260 U.S. 377, 382. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each "is exercising its own sovereignty, not that of the other." *Ibid.* And while the States, as well as the Federal Government, are subject to

> the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power.

[10] *United States v. Wheeler*, 435 U.S. 313, 316-17, 320 (1978) (footnotes omitted). Thus, *Bartkus* and *Abbate*, have not, as some defendants suggest, become suspect. *Accord*, *Hutul v. United States*, 582 F.2d 1155 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1222 (1979); *United States v. Johnson*, 516 F.2d 209 (8th Cir.), *cert. denied*, 423 U.S. 859 (1975); *Martin v. Rose*, 481 F.2d 658 (6th Cir.), *cert. denied*, 414 U.S. 876 (1973).

Defendants nonetheless claim that when federal authorities participate in and "control" the state litigation, the state litigation is a federal litigation for the purposes of the fifth amendment; and the federal government is precluded from prosecuting the state defendants for the same acts. Claiming that this argument states an exception to the rule quoted above, the defendants rely on language in *Bartkus* and *Abbate*.

Bartkus involved a state prosecution for bank robbery after the defendant had been acquitted of federal bank robbery charges. In rejecting defendant's claim that his fifth amendment rights had been violated, the Court stated:

> The state and federal prosecutions were separately conducted. It is true that the agent of the Federal Bureau of Investigation who had conducted the investigation on behalf of the Federal Government turned over to the Illinois prosecuting officials all the evidence he had gathered against the petitioner. Con-

> cededly, some of that evidence had been gathered after acquittal in [11] the federal court. The only other connection between the two trials is to be found in a suggestion that the federal sentencing of the accomplices who testified against petitioner in both trials was purposely continued by the federal court until after they testified in the state trial. The record establishes that the prosecution was undertaken by state prosecuting officials within their discretionary responsibility and on the basis of evidence that conduct contrary to the penal code of Illinois had occurred within their jurisdiction. It establishes also that federal officials acted in cooperation with state authorities, as is the conventional practice between the two sets of prosecutors throughout the country. It does not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.

359 U.S. at 122-24 (footnote omitted).[9]

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9. *Bartkus* was decided before the Supreme Court's decision in *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the double jeopardy prohibition of the fifth amendment is enforceable against the states through the fourteenth amendment. Thus, at the time *Bartkus* was decided, the fifth amendment per se did not apply to the situation presented in *Bartkus*, unless the state prosecution could be considered a federal prosecution for the purpose of the fifth amendment. This fact explains the discussion quoted in the text and the Court's conclusion that,

> [s]ince the new prosecution was by Illinois, and not by the Federal Government, the claim of unconstitutionality must rest upon the Due Process Clause of the Fourteenth Amendment.

In *Abbate* the defendants pleaded guilty to state charges of conspiring to destroy certain communication facilities and were subsequently convicted of federal charges arising out of the same acts. The Court held that the defendants' **[12]** fifth amendment rights had not been violated, but stated in a footnote:

> The circumstances of this case do not require us to consider the suggestion in the Government's brief that "no state prosecution can preclude the federal government from enforcing federal law." For example, there is nothing in this record to indicate any federal participation in the Illinois prosecution.

359 U.S. at 190 n. 4.

Assuming the language of *Bartkus* and *Abbate* does state an exception to the general principle that a prior state prosecution does not bar a subsequent federal prosecution against the same defendants for the same acts,[10] the court cannot agree that the state case should be considered a federal prosecution for the purpose of applying the dual sovereignty rule.[11]

[13] First, the *bringing* of the state prosecution cannot be said to be of the federal government's doing. The state

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10. It is worth noting that the language of *Bartkus* and *Abbate* relied on by defendants is never mentioned in *Wheeler*, despite the fact that the Court discussed at some length the proposition that "[t]he 'dual sovereignty' concept does not apply . . . in every instance where successive cases are brought by nominally different prosecuting entities." 435 U.S. at 318. The issue was present in *Wheeler* to the same degree as it was in *Abbate*, yet it was never addressed.

11. Defendant Lanci filed a motion requesting this court to review the entire transcript of the state proceedings prior to ruling on his motion to dismiss the indictment on the ground of double jeopardy. This court finds it unnecessary to do so. For the purpose of ruling on the double jeopardy issue, it will be assumed that the federal authorities' participation in the state case was as the defendants described it.

charges brought against the defendants were serious, including aggravated murder and aggravated arson. Certainly, when the state believes acts of this nature have taken place, it has a keen interest in the enforcement of its criminal statutes to punish such conduct. Any suggestion that the State of Ohio "in bringing its prosecution was merely a tool of the federal authorities" must be rejected: "[T]he prosecution was undertaken by state prosecuting officials within their discretionary responsibility and on the basis of evidence that conduct contrary to the penal code of [Ohio] had occurred within their jurisdiction." *Bartkus v. Illinois*, 359 U.S. at 123. There is no evidence or logic to support the notion that, but for the federal government's interest in the matter, the state prosecution would not have been brought.

The existence of federal-state cooperation does not change this conclusion or establish that the conducting, rather than the bringing, of the state prosecution was such that the federal government should be bound by the result. *Bartkus* itself makes clear that the fact that state authorities are supplied evidence by federal authorities, even when some of that evidence is gathered by the federal **[14]** authorities *after* an acquittal of federal charges, does not make the state prosecution federal. Nor does the fact of cooperation between federal and state prosecuting officials alter the result. Other courts have concluded that cooperation between federal and state investigating or prosecuting officials does not affect the application of the dual sovereignty rule. *United States v. Johnson*, 516 F.2d 209 (8th Cir.), *cert. denied*, 423 U.S. 859 (1975); *United States v. Richardson*, 580 F.2d 946 (9th Cir. 1978), *cert. denied*, 99 S.Ct. 835 (1979).

The record of this case to date reveals that federal agencies, particularly the FBI, apparently had an on-going

investigation of several individuals connected with the case including Daniel Greene and some of the defendants. It is not surprising then that the federal government would be in possession of evidence relevant to the state charges and that federal agents would be called to testify at the state trial. The fact that the state made use of this evidence does not establish that its prosecution was simply a sham or a cover for a federal prosecution.

The defendants, notably Cisternino and Carabbia, point to numerous instances of alleged misconduct on the part of federal agents, particularly in their invocation of a privilege when testifying at trial. They strenuously argue that they **[15]** were hampered in their cross-examination and the presentation of their defenses because several federal agents refused to answer questions on the ground that to do so was beyond their authorization. If defendants' rights were prejudiced by the state court's rulings on the question of privilege, that is a matter for the state appellate courts to rectify; it does not make the federal government a party to the state prosecution. Not infrequently courts must rule on questions of privilege and the scope of a criminal defendant's rights under the confrontation clause. The fact that the state court correctly or incorrectly upholds the claim of privilege does not make the person asserting it privy to the litigation.

Accepting as true for the purpose of ruling on this motion that the federal government's involvement in the state litigation was as the defendants characterize it, the court finds that these circumstances "do [ ] not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution and thereby in essential fact another federal prosecution." *Bartkus v. Illinois*, 359 U.S. at 124.

Defendants also contend that the federal government is collaterally estopped from litigating issues that were determined in the state litigation, citing *Ashe v. Swenson*, 397 U.S. 436 (1970). That case, however, makes clear that the principle of collateral estoppel "means simply that when **[16]** an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated *between the same parties* in any future lawsuit." *Id.* at 443. (Emphasis added.) Because, as the court has held above, the United States was not a party or privy to the state litigation, the principles of collateral estoppel do not preclude it from litigating issues litigated in the state case. *Martin v. Rose*, 481 F.2d 658 (6th Cir.), cert. *denied*, 414 U.S. 876 (1973).

There is also some suggestion by several defendants that the fact that the federal government voluntarily dismissed the first federal indictment somehow affects the double jeopardy issue. Of course, the prior indictment was dismissed before a jury was sworn or evidence in the case-in-chief taken, and therefore the defendants were never in jeopardy of those charges. *E.g., United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

For the reasons stated, the double jeopardy clause of the fifth amendment does not bar the bringing of this action. Defendants' motion to dismiss the indictment on that ground is therefore denied.

II.

Defendant Licavoli argues that this prosecution is brought in violation of the government's policy against successive federal and state prosecutions for the same acts, commonly **[17]** known as the *Petite* policy. This policy, adopted in response to *Petite v. United States*, 361

U.S. 529 (1960), provides that the authorization of the Attorney General's office for a federal prosecution after a state court trial for the same acts should be obtained and only when there are "compelling federal interests" involved.

Assuming the *Petite* policy has been violated by the bringing of this action,[12] there is nevertheless no basis for quashing the indictment. The Sixth Circuit has held that the *Petite* policy is an internal regulatory device with which the defendant has no right to demand and enforce compliance. *United States v. Frederick*, 583 F.2d 273 (6th Cir. 1978). This holding is in accord with the holdings of numerous other courts. *E.g., United States v. Musgrove*, 581 F.2d 406 (4th Cir. 1978); *United States v. Fritz*, 580 F.2d 370 (10th Cir.), *cert. denied*, 439 U.S. 947 (1978); *United States v. Nelligan*, 573 F.2d 251 (5th Cir. 1978); *United States v. Mechanic*, 454 F.2d 849 (8th Cir. 1971), *cert. denied*, 406 U.S. 929 (1972); *United States v. Hutul*, 416 F.2d 607 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).[13]

[18] Therefore, even if the *Petite* policy has been violated, defendants are not on that account entitled to dismissal of the indictment.

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12. The government's brief characterizes defendant Licavoli's claim as "unsubstantiated," and states that "Petite approval was obtained" for the present prosecution. No supporting affidavits or documentation, however, is provided.

13. *See Rinaldi v. United States*, 434 U.S. 22, 31 (1977):

> The overriding purpose of the *Petite* policy is to protect the individual from any unfairness associated with needless multiple prosecutions. The defendant, therefore, should receive the benefit of the policy *whenever its application is urged by the Government.*

(Emphasis added.) (Footnote omitted.)

III.

Defendants Carabbia and Cisternino argue:

> Facts in evidence from previous criminal proceedings between the parties document a course of bad faith conduct by the Federal law enforcement officers responsible for the investigation and prosecution of the government's present suit. As a result, it is the contention of [defendants Carabbia and Cisternino] that the government is now estopped from further prosecution of these same defendants for the same alleged acts and transactions which constitute the offenses charged as a matter of law.

Defendant Licavoli also urged this court to exercise its supervisory power to prevent "unfairness" on the part of the federal prosecutors.

The court finds nothing in the record that would warrant the extreme sanction of dismissal urged by defendants. As stated in section I, any prejudice to defendants' rights that are claimed to have resulted from the state court's upholding of the federal government's claim of privilege is an issue for the appellate courts to deal with. Rulings by this court on issues of privilege, discovery, and *Brady* materials are adequate to deal with any similar problems that may arise in this court.

[19] Defendants point to alleged misrepresentations by federal agents and various acts of alleged misconduct by those agents. The court finds, however, that these acts, assuming they occurred, are insignificant or unobjectionable or can be remedied by other means and in no event lead to the conclusion that this prosecution is undertaken in bad faith and should be dismissed. Likewise, the fact that more

than one indictment was filed does not warrant dismissal of this case. See *Dortch v. United States*, 203 F.2d 709 (6th Cir.), *cert. denied*, 346 U.S. 814 (1953). Therefore, defendants' motion to dismiss on this ground is denied.

IV.

Section 1962 as an Assimilative Statute

Defendant Calandra argues that in prosecuting him under section 1962(d), the government may not allege and prove his involvement with the murder of Daniel Greene because Congress, by making state law the measure of "racketeering activity" for the purpose of section 1962,[14] intended that there be no **[20]** offense under section 1962 when the defendant has been acquitted of the violations of state law that are alleged in the federal indictment as acts of racketeering. Defendant Calandra was acquitted of aggravated murder in state court, and therefore, he argues, he cannot, as a matter of law, be guilty of the racketeering act of murder. He relies heavily on *United States v. Mason*, 213 U.S. 115 (1909).

The defendants in *Mason* were charged with a conspiracy to intimidate certain persons in the exercise of their rights under the Constitution and laws of the United States in violation of section 5508, Rev. Stat. It was specifically alleged that the defendants murdered a Joseph Walker in pursuance of and to effectuate the object of their conspiracy. Section 5509, Rev. Stat., provided:

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14. "Racketeering activity" is defined in 18 U.S.C. §1961(1), which reads in pertinent part:

> "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing with narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; . . . .

> If, in the act of violation [section 5508], any other felony or misdemeanor be committed, the offender shall be punished for the same and with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed.

The defendants had been acquitted in state court of the murder of Joseph Walker before they were charged under federal law. They filed a "demurrer to the indictment and to each count thereof, as well as 'a plea in bar in the nature of a plea of formal acquittal' to so much of each count as charged them **[21]** with the crime of having killed and murdered one Walker." 213 U.S. at 120.

In sustaining the defendants' position, the Supreme Court thus noted the scope of the issue: "The question thus presented is within a very narrow compass, and involves and inquiry as to the meaning and scope of §5509." *Id.* at 123. The Court then held:

> The language of that section is entirely satisfied and the ends of justice met if the statute is construed as *not* embracing, nor intended to embrace, any felony or misdemeanor against *the State* of which, *prior to the trial in the Federal court of the Federal offense charged*, the defendants had been lawfully acquitted of the alleged state offense by a state court having full jurisdiction in the premises.

The same arguments made by the defendant Calandra were made and rejected in *United States v. Frumento*, 563 F.2d 1083 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978). In that case, the court distinguished *Mason*, and stated:

> Section 1961 *et seq.* of the Federal Racketeering Act forbids "racketeering" not state offenses per se. The state offenses referred to in the federal act are definitional only; racketeering, the federal crime, is defined as a matter of legislative draftsmanship by reference to state law crimes. This is not to say, as the dissent suggests, that the federal statute punishes the same conduct as that reached by state law. The gravamen of section 1962 is a violation of federal law and "reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage."

[22] 563 F.2d at 1087 (footnote omitted). The court also explained in a footnote, "Section 1961 requires, in our view, only that the *conduct* on which the federal charge is based be typical of the serious crime dealt with by the state statute, not that the particular defendant be 'chargeable under State law' at the time of the federal indictment." *Id.* n. 8A.

The Fifth Circuit has also adopted this holding in *United States v. Malatesta*, 583 F.2d 748 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1508 (1979). There, the court held:

> The enumeration of certain classes of state offenses in the section 1961 lists of acts of racketeering is solely for definitional purposes. *United States v. Frumento* . . . There is no requirement that a state conviction be obtained where a state offense is part of the racketeering activity charged. Because the United States was not a party in the state proceedings, it is not collaterally estopped from proving in the federal prosecutions facts that the state was unable to prove. *United States v. Frumento, supra.*

Id. at 757.

This court agrees with the *Frumento* and *Malatesta* courts that section 1961's reference to state crimes is definitional only. Therefore, dismissal of a RICO indictment is not required when a defendant has been acquitted in state court of the state offenses that are alleged to comprise "racketeering activity" under section 1962. *See United States v. Brown*, 555 F.2d 407, 418 n. 22 (5th Cir. 1977), *cert. denied*, **[23]** 435 U.S. 904 (1978). *See also, United States v. Revel*, 493 F.2d 1 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975).

Therefore, for all the reasons stated in this memorandum, defendants' motions to dismiss the indictment on the grounds considered herein are denied.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed February 17, 1984)

82-3510

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN P. CALANDRA,
Defendant-Appellant.

ORDER

Before: MERRITT and KENNEDY, *Circuit Judges;* and PRATT, *District Judge.**

The Court not having favored rehearing en banc in this case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

/s/ JOHN P. HEHMAN
Clerk

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*Honorable Philip Pratt, United States District Court for the Eastern District of Michigan, sitting by designation.

ORDER OF THE UNITED STATES COURT OF APPEALS STAYING MANDATE

(Filed February 29, 1984)

No. 82-3510

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN P. CALANDRA,
Defendant-Appellant.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Effective 1791)

18 U.S.C. § 1961

CRIMES AND CRIMINAL PROCEDURE

§ 1961. Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any or the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act

indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for

the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962

RACKETEER ORGANIZATIONS

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United

States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

OHIO REVISED CODE

HOMICIDE

2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immeditely after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

2903.02 Murder

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2323.01 Conspiracy.

(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, corrupting another with drugs, trafficking in drugs, theft of drugs, or

illegal processing of drug documents shall do either of the following:

(1) With another person or persons, plan or aid in planning the commission of any such offense;

(2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commission of any such offense.

(B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by him or a person with whom he conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of such character as to manifest a purpose on the part of the actor that the object of the conspiracy should be completed.

(C) When the offender knows or has reasonable cause to believe that a person with whom he conspires has also conspired or is conspiring with another to commit the same offense, then the offender is guilty of conspiring with such other person, even though his identity may be unknown to the offender.

(D) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the conspiracy was impossible under the circumstances.

(E) A conspiracy terminates when the offense or offenses which are its objects are committed, or when it is abandoned by all conspirators. In the absence of abandonment, it is no defense to a charge under this section that no offense which was the object of the conspiracy was committed.

(F) A person who conspires to commit more than one offense is guilty of only one conspiracy, when such offenses are the object of the same agreement or continuous conspiratorial relationship.

(G) When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

(H) No person shall be convicted of conspiracy upon the testimony of a person with whom he conspired, unsupported by other evidence.

(I) The following are affirmative defenses to a charge of conspiracy:

(1) After conspiring to commit an offense the actor thwarted the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(2) After conspiring to commit an offense, the actor abandoned the conspiracy prior to the commission of or attempt to commit any offense which was the object of the conspiracy either by advising all other conspirators of his abandonment, or by informing any law enforcement authority of the existence of the conspiracy and of his participation therein.

(J) Whoever violates this section is guilty of conspiracy, which is:

(1) A felony of the first degree, when one of the objects of the conspiracy is aggravated murder or murder;

(2) A felony of the next lesser degree than the most serious offense which is the object of the conspiracy, when

the most serious offense which is the object of the conspiracy is a felony of the first, second, or third degree;

(3) A misdemeanor of the first degree, when the most serious offense which is the object of the conspiracy is a felony of the fourth degree.

(K) This section does not define a separate conspiracy offense or penalty where conspiracy is defined as an offense by one or more sections of the Revised Code, other than this section. In such case, however:

(1) With respect to the offense specified as the object of the conspiracy in such other section or sections, division (A) of this section defines the voluntary act or acts and culpable mental state necessary to constitute the conspiracy;

(2) Divisions (B) to (I) of this section are incorporated by reference in the conspiracy offense defined by such other section or sections of the Revised Code.

§ 2923.03 Complicity.

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

Nos. 83-1573, 83-1657 and 83-1801

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN P. CALANDRA, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES T. LICAVOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY LIBERATORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of racketeering conspiracy, in violation of 18 U.S.C. 1962(d).

2. Whether the trial court erred in denying petitioner Licavoli's motion for a severance.

3. Whether the trial court's evidentiary rulings were correct.

4. Whether the trial court correctly instructed the jury concerning the predicate offenses of conspiracy and murder.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (83-1573 Pet. App. A1-A26) is reported at 725 F.2d 1040. Relevant opinions

of the district court (83-1573 Pet. App. A27-A57, A60-A79; 83-1657 Pet. App. A26-A72; 83-1801 Pet. App. A38-A63) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1984. A petition for rehearing filed by petitioner Calandra was denied on February 17, 1984, and his petition for a writ of certiorari (No. 83-1573) was filed on March 23, 1984. On March 6, 1984, Justice O'Connor extended the time within which petitioner Licavoli could file a petition for a writ of certiorari to and including April 8, 1984 (a Sunday), and his petition (No. 83-1657) was filed on April 9, 1984. A petition for rehearing filed by petitioner Liberatore was denied on March 5, 1984, and his petition for a writ of certiorari (No. 83-1801) was filed on May 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Two sections of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 and 1962, are reproduced at 83-1573 Pet. App. A82-A86.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioners and three co-defendants, Pasquale Cisternino, Ronald Carabbia, and Kenneth Ciarcia, were convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d). Petitioner Licavoli was sentenced to ten years' imprisonment. Petitioners Calandra and Liberatore were each sentenced to 14 years' imprisonment.[1]

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[1] Co-defendants Cisternino and Carabbia were each sentenced to 12 years' imprisonment; co-defendant Ciarcia was sentenced to ten years' imprisonment.

1. The evidence at trial showed that between 1976 and 1978 petitioner Licavoli was a leader of organized crime in Cleveland, Ohio; petitioners Calandra and Liberatore played supervisory roles and co-defendants Carabbia, Cisternino, and Ciarcia played subsidiary roles in the organization. Throughout this period, petitioners and their co-defendants sought to establish control over criminal activities in the area by means of murder, wiretapping, and bribery. Pet. App. A2-A3.[2]

a. In the spring of 1976, Licavoli decided to have Danny Greene killed in order to eliminate competition from Greene's criminal activity in the West Cleveland area. Licavoli had a colleague, James Fratianno, contact Raymond Ferritto for the purpose of hiring him to murder Greene (Tr. 1662-1663). After a series of meetings with Licavoli, Calandra, and several of the co-defendants, Ferritto traveled to Cleveland to stalk Greene and, with the aid of Cisternino and Carabbia, to determine his pattern of activities. In August 1977, Ferritto asked Licavoli for money to cover his expenses. Licavoli replied that he would speak with Calandra, who would provide Ferritto with some money. Several days later, in the presence of Calandra, Carabbia gave Ferritto $5,000 to defray expenses he had incurred. Licavoli also promised Ferritto that when the murder was accomplished Ferritto would receive 25% of the proceeds of gambling activities in the Warren and Youngstown areas. Pet. App. A3; Tr. 1725-1726, 1734-1735, 2333-2334. During September 1977, Ferritto and Cisternino attempted unsuccessfully to kill Greene by placing a bomb outside the door of his apartment (Tr. 1751-1757, 2378-2379).

During the same period, Liberatore and an associate, Thomas Lanci, recruited Louis Aratari, an ex-convict who worked for Liberatore, to "tak[e] Danny Greene out with a gun" (Tr. 3115) and to murder five of Greene's

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[2] "Pet. App." refers to the appendix to the petition in No. 83-1573, unless otherwise indicated.

henchmen, including his son (Tr. 3199-3202, 6574). Aratari agreed to commit the murders for $5,000 each and a share in the proceeds of the gang's activities (Tr. 3200-3202). He and a partner, Vic Guiles, then began to stalk Greene. At one point, Liberatore and Calandra showed Aratari some of the places Greene frequented, including his "headquarters" (Tr. 3122-3126). Calandra explained on that occasion that "the other two guys," Ferritto and Carabbia, needed a "back-up team" because, whenever they were in front of a location, Greene would leave by the back (Tr. 3124). Calandra arranged for Ferritto to meet Aratari at a hotel, where they discussed strategies for killing Greene and agreed that Aratari and Guiles would serve as the back-up team for Ferritto and Carabbia (Tr. 1766, 2338-2344, 3139-3147). Thereafter, the two teams made plans to kill Greene when he left or entered his apartment building and to murder his associates with a hand grenade (Tr. 3267-3270, 4911-4913).

On Monday October 3, 1977, Carabbia called Ferritto and set up a meeting for the following day with Licavoli, Calandra, and Cisternino (Tr. 1760-1763, 2354-2355). At the meeting, the defendants, who had wiretapped Greene's telephone, played a recording of Greene's girlfriend making a dental appointment for him for the following Thursday (Tr. 1764-1765, 2355-2356). On Wednesday Carabbia met with Aratari and Guiles. He explained that he had an "inside lead on Danny Greene" and that Greene would be going to the dentist the next day. Tr. 3342, 4933.

On the date of Greene's dental appointment, Cisternino and Ferritto constructed a bomb. Ferritto then drove to the vicinity of the dentist's office with the device in his car; Carabbia followed in a second car with a box into which the device was to be placed. Aratari and Guiles, armed with a high powered rifle, arrived in another car supplied by Ciarcia. The plan was for Guiles to shoot

Greene if possible, with the bomb as a back-up measure. Pet. App. A4.

When Greene arrived for his appointment and entered the dentist's office, Guiles had no opportunity to shoot him. When a parking space opened next to Greene's car, Ferritto placed the bomb in the box on the side of Carabbia's car and parked that vehicle next to Greene's car. When Greene emerged from his appointment, Ferritto and Carabbia drove away in Ferritto's car, and Carabbia detonated the bomb with a remote control device. Pet. App. A4-A5; Tr. 1795-1800, 2370-2372. Greene died as a result of the explosion, and Greene's and Carabbia's cars were destroyed (Tr. 2944, 4597, 4624). The following day, in a conversation intercepted by law enforcement authorities pursuant to a court order, Calandra and Licavoli discussed the bomb and the need to watch out for one of Greene's henchmen (GX 120).

b. During the period covered by the indictment, Geraldine Rabinowitz worked as a file clerk in the Cleveland office of the FBI. Her future husband worked at an automobile dealership where Ciarcia was sales manager (Tr. 538-539). In the spring of 1977, Ciarcia asked that Rabinowitz obtain confidential FBI information concerning investigations of himself, Licavoli, or Liberatore (Tr. 213-214). After some initial hesitation, Rabinowitz furnished Ciarcia with an investigative report on Licavoli (Tr. 214-215, 217-218). Ciarcia showed the documents to Liberatore and made photocopies for him (Tr. 6531-6539). Rabinowitz subsequently agreed to obtain the names of the informants who had furnished the information contained in the report (Tr. 225-229, 243-244). She also furnished Ciarcia and Liberatore with confidential information about wiretaps, license plate numbers of FBI surveillance vehicles, and identities of other informants (Tr. 244-260). During this period Ciarcia promised that he would assist Rabinowitz in obtaining a downpayment on a house for her and her husband (Tr. 313, 549-

550). Liberatore later delivered $15,000 in cash to Rabinowitz to cover the downpayment (Tr. 593-598, 604-609). No interest or schedule of repayment for the loan was set, and no provision was made for collateral (Tr. 916-917).

2. Before the trial in this case, petitioners and their co-defendants were tried in state court for aggravated murder. Cisternino, Carabbia, and Ciarcia were convicted, while Licavoli and Calandra were acquitted; the jury was unable to reach a verdict in the trial of Liberatore.

In May 1979, petitioners, their co-defendants, and Thomas Lanci were charged in a four-count indictment by a federal grand jury (83-1801 Pet. App. A27-A37). Count 1 was the racketeering conspiracy charge at issue in this case. The alleged underlying predicate acts included, inter alia, conspiracy to murder Daniel Greene, murder and aiding and abetting the murder of Greene, and bribery of an FBI employee.[3] The indictment also charged the defendants with conspiracy to commit bribery and with two counts of bribery, based on the scheme to obtain FBI information from Geraldine Rabinowitz. The district court severed the bribery and bribery conspiracy counts and set them for trial first. Licavoli and Calandra were acquitted at that proceeding. Liberatore was convicted on the bribery conspiracy count and on one of the two substantive bribery counts.[4]

The district court then proceeded to trial on the racketeering conspiracy count. Prior to trial, the court ruled that the acquittal of Licavoli and Calandra on the bribery charges barred the government from relying on acts of

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[3] Count 1 also alleged that the defendants conspired to murder Greene's associate, John Nardi. However, the district court ruled that this scheme was part of a single conspiracy to murder. Pet. App. A47-A54.

[4] Ciarcia pleaded guilty to the bribery counts; Lanci was convicted on two of the counts; Cisternino and Carabbia were acquitted.

bribery to support the racketeering conspiracy charge against them, leaving murder and conspiracy to commit murder as the only remaining predicate acts in their cases. 83-1801 Pet. App. A51-A58.[5] The court denied the motion of Licavoli and Calandra to sever their cases, but instructed the jury that it should not consider any testimony by Rabinowitz in connection with the case against Licavoli and Calandra.

At the close of the government's case, and again following their convictions, petitioners filed motions for judgments of acquittal pursuant to Fed. R. Crim. P. 29. The court denied those motions, rejecting arguments that a conspiracy to commit murder cannot constitute a predicate racketeering act under 18 U.S.C. 1961 and that the offenses of murder and conspiracy to commit murder cannot constitute separate racketeering predicate offenses because they merge upon conviction for the former offense under Ohio law (Pet. App. A27-A57). See also 83-1657 Pet. App. A42-A72.

3. The court of appeals affirmed (Pet. App. A1-A26). It rejected petitioners' claims that conspiracy to murder could not constitute a racketeering predicate offense and that murder and conspiracy to commit murder could not constitute separate racketeering predicate offenses (*id.* at A6-A12). The court also held (*id.* at A12-A13) that double jeopardy and collateral estoppel principles did not bar the use of murder as a predicate offense for the RICO prosecution, even though petitioners Licavoli and Calandra had been acquitted in state court, citing *United States* v. *Frumento*, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978). In addition, the court rejected the contention of Licavoli and Calandra that the district court erred in denying their motion for a severance and

[5] The district court ruled (83-1801 Pet. App. A55) that in Liberatore's case principles of collateral estoppel required dismissal of the RICO predicate act that arose out of the same conduct as the substantive bribery charge on which he had been acquitted.

that they were prejudiced by evidence offered against their co-defendants concerning the bribery of Geraldine Rabinowitz (Pet. App. A20-A23).

The court of appeals also rejected claims that prior testimony of Ferritto should not have been admitted at trial (Pet. App. A13-A17); that double jeopardy principles barred the government from using bribery as a RICO predicate offense (*id.* at A18-A20); and that the district court erred in refusing to excuse a juror who discovered during the trial that he was acquainted with a government witness (*id.* at A23-A24). The court summarily rejected petitioners' claims that they were prejudiced by various evidentiary rulings, including admission of co-conspirator statements, references to court-ordered electronic surveillance of Licavoli, and references to participation of government witnesses in the Witness Protection Program (*id.* at A20).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Thus, no further review is warranted.

1. Petitioners advance a number of different theories in support of their contention (83-1573 Pet. 5-19; 83-1657 Pet. 19-30; 83-1801 Pet. 9-20) that they could not be convicted of racketeering conspiracy.

a. Petitioner Calandra contends (83-1573 Pet. 5-10) that, because he was acquitted in state court of the murder of Greene, principles of double jeopardy and collateral estoppel preclude use of that murder as a predicate offense supporting his racketeering conspiracy conviction. The court of appeals properly rejected this contention (Pet. App. A12-A13).

It is settled law that an acquittal in state court does not bar a subsequent prosecution based on the same conduct in federal court. See *United States* v. *Wheeler*, 435 U.S. 313, 316-320 (1978); *Rinaldi* v. *United States*, 434

U.S. 22, 28 (1977); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121, 128-139 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922). As the Court explained in *Lanza* (*id.* at 382), "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The * * * double jeopardy * * * forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."[6]

The Third Circuit, in *United States* v. *Frumento*, 563 F.2d 1083, 1087 (1977), cert. denied, 434 U.S. 1072 (1978), rejected a claim virtually identical to that raised here. The court correctly noted in *Frumento* that the RICO statute does not punish the same crimes as state law. Instead, 18 U.S.C. 1962 establishes a federal crime—racketeering—that is merely defined in part by reference to state law crimes. Moreover, it is most unlikely that Congress would have wished an acquittal in state court to bar a federal racketeering prosecution based on the same offense. If that were the rule, federal prosecutions could be defeated by ineffective prosecution or even corrupt collusion by state officials, or by state procedural nuances, such as restrictive evidentiary rules.[7]

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[6] Thus, contrary to petitioner Calandra's contention (83-1573 Pet. 7), the principle that barred use of the federal bribery offenses of which he had been acquitted was inapplicable to the state murder charge.

[7] Relying on *Bartkus* v. *Illinois*, *supra*, petitioner Liberatore contends (83-1801 Pet. 16-20) that the dual sovereignty principle is inapplicable here because of pervasive federal involvement in the state prosecution. Since Liberatore was not acquitted of Greene's murder (because the jury was unable to reach a verdict in his case), double jeopardy principles would not bar his reprosecution. See, *e.g.*, *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978). Moreover, although the Court noted in *Bartkus* that the state prosecution there was not a "sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution" (359 U.S. at 124), it clearly did not mean thereby to restrict coopera-

b. Petitioners also claim (83-1573 Pet. 10-15; 83-1657 Pet. 26-30; 83-1801 Pet. 9-12) that, by virtue of the operation of Ohio law, the government failed to prove two separate predicate acts of racketeering activity. A conviction under RICO requires proof of the commission of, or conspiracy to commit, at least two acts of racketeering activity. See 18 U.S.C. 1962(c) and (d); 18 U.S.C. 1961(5).[8] Racketeering activity is defined in 18 U.S.C. 1961(1)(A) as, inter alia, "any act or threat involving murder * * *, which is chargeable under State law and punishable by imprisonment for more than one year * * *." Under federal law, a defendant can be convicted of both a substantive offense and conspiracy to commit that offense. See, *e.g.*, *Iannelli* v. *United States*, 420 U.S.

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tion between federal and state law enforcement authorities in investigating and prosecuting acts that violate the laws of both sovereigns. The district court expressly found (Pet. App. A70-A72) that the federal-state cooperation in this case (which consisted primarily of sharing of evidence and expert witnesses) was not of the type that would convert the state prosecution into a sham or cover for a federal prosecution. See also *Bartkus*, 359 U.S. at 122-123.

[8] 18 U.S.C. 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. 1961(5) provides that, as used in the RICO statute,

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]

770, 777-778 (1975). However, Ohio Rev. Code Ann. § 2923.01(G) (Page 1982) provides that

> [w]hen a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

Petitioners contend that, because they could not be convicted in Ohio courts of both the murder of Greene and conspiracy to commit that murder, violations of Ohio statutes prohibiting these offenses cannot constitute separate predicate acts for purposes of the federal racketeering statute.

The court of appeals properly rejected this claim (Pet. App. A9-A12). As the court observed (*id.* at A10, A11), although an individual cannot be convicted of, or sentenced for, both murder and conspiracy to commit murder under Ohio law, those offenses are "separately chargeable under [Ohio] law," and each is "punishable by imprisonment for more than one year." [9] The RICO statute does not require that offenses charged as predicate acts be subject to cumulative punishments under state law. Thus, it is no defense to a RICO charge that an Ohio court could not enter separate judgments or impose cumulative sentences for conspiracy and the related substantive offense.[10]

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[9] The crime of aggravated murder is defined in Ohio Rev. Code Ann. § 2903.01 (Page 1982). The crime of conspiracy to murder is defined in *id.* § 2923.01.

[10] Calandra (83-1573 Pet. 12-14) and Liberatore (83-1801 Pet. 11) err in relying on *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), to support their contention that the murder and conspiracy offenses merged for purposes of the racketeering statute. In *Phillips*, the court held that under 21 U.S.C. 841(a)(1), distribution of marijuana and possession of the same marijuana with the intent to distribute it constituted the same offense when they were both part of a single

Moreover, variations on the relationship between conspiracy and the underlying substantive offense under state law do not control the definition of racketeering acts under federal law. As the court of appeals observed (Pet. App. A11), the reference to state law in the racketeering statute is for the purpose of defining the conduct prohibited. It is not meant to incorporate state procedural rules. See *United States v. Welch*, 656 F.2d 1039, 1058 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Salinas*, 564 F.2d 688, 690-693 (5th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States* v. *Frumento*, 563 F.2d at 1087 n.8A; *United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978). Thus, the fact that petitioners could not be convicted separately for particular offenses in state court does not preclude the use of those offenses as separate predicate acts under the RICO statute, especially since, as noted above (page 10, *supra*),

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act and that they could not be charged as separate acts of racketeering in such circumstances. Here the conspiracy to murder and the murder itself clearly did not constitute a single act. The court in *Phillips* noted that the RICO statute required that each racketeering act constitute a "separate crime[]," but was careful to point out that separate crimes need not "be in the context of independent schemes or objectives" (664 F.2d at 1038). Because conspiracy and the related substantive offense are "separate crimes" under both Ohio and federal law, the rationale of *Phillips* is inapplicable here.

Nor is it of consequence that the reviser's note to the Ohio statute prohibiting complicity (Ohio Rev. Stat. Ann. § 2923.03 (Page 1982)) states that an accomplice is one who solicits, procures, or conspires with another to commit an offense, aids or abets its commission, or causes an innocent or irresponsible person to commit the offense. See 83-1573 Pet. 12. The trial court here did not define the offense of murder in terms of conspiring; rather, it discussed aiding and abetting murder in terms of willful participation in commission of the murder (C.A. App. 564-566). As the court below observed (Pet. App. A10-A11), Ohio has adopted the common law view that conspiracy and the substantive crime are separate offenses, even though it has now chosen to prohibit cumulative convictions and punishments.

conspiracy and the substantive object offense are separate crimes under federal law.[11]

c. Petitioner Licavoli contends (83-1657 Pet. 23-26) that, in any event, 18 U.S.C. 1961(1) does not embrace conspiracy to commit murder as a racketeering predicate offense. The court of appeals properly rejected that contention (Pet. App. A6-A9).

As this Court recently reiterated in *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4 (quoting

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[11] Licavoli errs in relying (83-1657 Pet. 29-30) on *United States* v. *Mason*, 213 U.S. 115 (1909), to support his contention that merger of the murder and conspiracy offenses under state law should govern the federal racketeering prosecution. In *Mason* the defendants were charged with conspiring to hinder or obstruct federal officers in the exercise of rights secured to them under the law of the United States and with murdering a federal officer as part of the conspiracy. The conspiracy was alleged to violate Rev. Stat. § 5508 (1875 ed.). A companion provision, Rev. Stat. § 5509 (1875 ed.) provided that "if in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed." See 213 U.S. at 119. The Court noted (*id.* at 123) that the question before it—the effect of the defendants' acquittal of murder in state court—was a narrow one, involving "an inquiry as to the meaning and scope of § 5509." It held that, because the defendants had been acquitted of murder by the state courts, Section 5509 was inapplicable. The Court reasoned that "[t]he murder in question, if committed at all, was, as a distinct offense, a crime only against the State, and after the defendants were acquitted of that crime by the only tribunal that had jurisdiction of it *as an offense against the State*, it is to be taken that no such crime of murder as charged in the indictment was in fact committed by them." 213 U.S. at 124 (emphasis in original).

The holding in *Mason* is inapposite in the context of the RICO statute, which does not merely adopt for sentencing purposes "a distinct offense, a crime only against the State" (213 U.S. at 124). Rather, the RICO statute defines criminal activity punishable under federal law by reference to state law to identify the type of activity that is federally prohibited. See *Frumento*, 563 F.2d at 1087 (noting that "[t]he murder at issue in *Mason* did not constitute an offense against the United States").

United States v. *Turkette*, 452 U.S. 576, 580 (1981)), " '[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as exclusive." " 18 U.S.C. 1961(1)(A) broadly defines as racketeering activity "any act or threat involving murder [or other enumerated generic crimes] which is chargeable under State law and punishable by imprisonment for more than one year." Conspiracy to commit murder, an offense prohibited by Ohio law and punishable by imprisonment for over a year, plainly falls within the literal terms of that section. See Pet. App. A6.

The holding of the court of appeals is in accord with decisions of other courts of appeals, which have concluded that conspiracy can constitute a predicate offense in the context of Section 1961(1)(A) and analogous provisions of the RICO statute. See *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir. 1984) ("conspiracy to commit murder qualif[ies] as a RICO predicate act under Group A, § 1961(1)(A)"). *United States* v. *Welch*, 656 F.2d at 1063 n.32 (the language of subsection A appears to contemplate conspiracy to commit murder); see also *United States* v. *Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983) (conspiracy to obstruct, delay, or affect commerce by robbery, extortion or physical violence constitutes a predicate act under 18 U.S.C. 1961(1)(B)); *United States* v. *Phillips*, 664 F.2d at 1015 (conspiracy to import drugs may properly be alleged as a predicate act of racketeering under 18 U.S.C. 1961(1)(D)); *United States* v. *Weisman*, 624 F.2d 1118, 1123-1124 (2d Cir.), cert. denied, 449 U.S. 871 (1980) (conspiracy to commit securities fraud or bankruptcy fraud qualifies as predicate act under Section 1961(1)(D)).[12]

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[12] Licavoli errs in relying on *United States* v. *Bagaric*, 706 F.2d 42, 62 n.17 (2d Cir. 1983), cert. denied, Nos. 82-6911, 82-6925 (Oct.

Licavoli notes (83-1657 Pet. 23-24) that one of the precursors of the RICO statute defined criminal activity as any one of a number of enumerated generic crimes and "any conspiracy to commit any of the foregoing offenses." He contends that omission of the reference to conspiracy in the final version of the statute the following year demonstrates Congress's intent not to make conspiracy a separate act of racketeering (83-1657 Pet. 24). But that omission does not constitute the sort of "clearly expressed" legislative history that would defeat the otherwise "conclusive" effect of the statute's unambiguous language. See *Russello* v. *United States*, slip op. 4, 10. The RICO legislation that was ultimately enacted was significantly different from the bills of the previous year, and the legislative history contains no explanation for the particular omission on which Licavoli relies. See Pet. App. A41. In view of the broad language used in the final version of the legislation, the reference to conspiracy may have been omitted simply because it was regarded as redundant. Moreover, in view of Congress's purpose to reach high-ranking racketeers, as well as "street-level" employees of racketeering enterprises, it seems most unlikely that Congress meant to immunize those who do not personally involve themselves in racketeering activities, but participate only as conspirators. See Pub. L. No. 91-452, § 904(a), 84 Stat. 947, 18 U.S.C. 1961 note (provisions of RICO are to "be liberally construed to effectuate its remedial purposes"); *Russello* v. *United States*, slip op. 10-11; *United States* v. *Ruggiero*, 726 F.2d at 919 (legislative purpose of RICO statute

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3, 1983), No. 83-5206 (Oct. 17, 1983), to support his claim that the Second Circuit has limited the reasoning of *Weisman* to conspiracies charged as predicate acts under Section 1961(1)(D). In *United States* v. *Ruggiero*, 726 F.2d at 918-919, 921, the Second Circuit held that its reasoning in *Wiesman* extends to murder conspiracies charged as predicate acts under Section 1961(1)(A).

supports conclusion that conspiracy to murder constitutes an act of racketeering activity under the RICO statute).

d. Petitioner Calandra maintains (83-1573 Pet. 15-19) that, at least as to a racketeering conspiracy charge under 18 U.S.C. 1962(d), conspiracy to murder and the substantive offense of murder cannot constitute the two predicate acts necessary to support a conviction. That claim is without merit.

Contrary to Calandra's claim (83-1573 Pet. 18), it is not redundant for a conspiracy charge to constitute a predicate offense for a violation of 18 U.S.C. 1962(d). As the Second Circuit explained in *United States* v. *Ruggiero*, 726 F.2d at 923, "[a] RICO conspiracy under § 1962(d) based on separate conspiracies as predicate offenses is not merely a 'conspiracy to conspire' * * *, but is an overall conspiracy to violate a substantive provision of RICO, in this case § 1962(c), which makes it unlawful for any person associated with an interstate enterprise to 'participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.'" See also *United States* v. *Zemek*, 634 F.2d 1159, 1170 n.15 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981), in which the court explained that a conspiracy may properly constitute a predicate offense in connection with a RICO conspiracy charge because "[t]he essence of a RICO conspiracy is not an agreement to commit predicate crimes but an agreement to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering." [13]

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[13] The district court instructed the jury that, in order to convict on the RICO conspiracy count, it must find that the defendants "conspired together to violate 18 U.S.C. § 1962(c) by being associated with an enterprise engaged in activities which affected interstate commerce and the purpose of which was to control the criminal activities in various cities in the Northern District of Ohio by means of murder, bribery, and other activities" (C.A. App. 548). The court further instructed that, as an additional element, the jury must find that "the particular defendant under consideration engaged in a pattern of racketeering activity * * * by knowingly

Nor is it improper to base a RICO conspiracy on two predicate acts of racketeering that consist of conspiracy and the consummated offense. It is axiomatic that a substantive crime and conspiracy are separate offenses for purposes of prosecution and punishment. See *e.g.*, *Iannelli* v. *United States*, 420 U.S. at 777; *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961). Conspiracy "poses distinct dangers quite apart from those of the substantive offense" (*Iannelli*, 420 U.S. at 778), including an increased likelihood that the conspiratorial objectives will be attained and that the participants will commit crimes unrelated to the original purpose for which the conspiracy was formed. See *Callanan* v. *United States*, 364 U.S. at 593-594.

The rationale that underlies this principle is particularly apt in this case. The evidence showed that petitioners engaged in a conspiracy lasting over a year and having as its objective not only the murder of a single individual, but the murder of all members of a competing criminal organization. During that period, petitioners and their henchmen planned and attempted various schemes for murdering Greene, each of which seriously jeopardized the safety of others. They recruited

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and willfully committing, or knowingly and willfully aiding and abetting, at least two acts of racketeering activity" (*id.* at 557).

This instruction is more favorable to the defendant than that prescribed by the decisions on which Calandra relies. In *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), and *United States* v. *Barton*, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 857 (1981), the courts held that, in the context of a RICO conspiracy charge, it was sufficient for the government merely to demonstrate that the defendant agreed to perform at least two predicate acts. See also *United States* v. *Carter*, 721 F.2d 1514, 1531 (11th Cir. 1984). Here the instructions required the jury to find that petitioners willfully committed, or aided and abetted in the commission of, two acts of racketeering activity, not merely that they agreed to the commission of those offenses.

numerous hit men who participated in these schemes. To view the conspiracy to murder Greene merely as part and parcel of the consummated murder for purposes of the federal racketeering statute would be particularly unrealistic on the facts of this case.

In any event, 18 U.S.C. 1961(5) simply requires "two acts of racketeering activity." It does not require that those acts be separated in time or subject matter, or that they involve different participants. See *United States* v. *Phillips*, 664 F.2d at 1038-1039; *United States* v. *Starnes*, 644 F.2d 673, 677-678 (7th Cir.), cert. denied, 454 U.S. 826 (1981); *United States* v. *Weatherspoon*, 581 F.2d 595, 601-602 (7th Cir. 1978); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Because the act of conspiring to commit murder and the act of murder both qualify as racketeering acts under 18 U.S.C. 1961(1), and because conspiracy and the related substantive offense constitute separate illegal acts under both federal and state law, the statutory requirement was satisfied in this case.[14]

e. Finally, petitioner Liberatore urges (83-1801 Pet. 13-16) that, because he previously was convicted of bribery and conspiracy to commit bribery, double jeopardy principles preclude use of the same offenses as predicate acts to support his RICO conspiracy conviction. It is well established, however, that a defendant may be separately convicted and punished for substantive crimes and for a RICO violation that charges those crimes as

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[14] Licavoli also contends (83-1657 Pet. 6) that the court of appeals' statement that "[a]ll that is now required for a RICO offense is the commission of two predicate offenses * * *. No further indicia of 'enterprise' is now necessary" is contrary to this Court's decision in *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). In fact, the quoted language is from Judge Merritt's concurring opinion (Pet. App. A26). Moreover, while the Court held in *Turkette* that a racketeering enterprise is distinct, for purposes of proof, from predicate racketeering offenses, it went on to observe that the proof used to establish those separate elements "may in particular cases coalesce." 452 U.S. at 583.

predicate offenses. As the court explained in *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980), "[t]he racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions." See also, *e.g.*, *United States* v. *Greenleaf*, 692 F.2d 182, 189 (1st Cir. 1982), cert. denied, No. 82-1225 (Apr. 4, 1983); *United States* v. *Hartley*, 678 F.2d 961, 991-992 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *United States* v. *Hawkins*, 658 F.2d 279, 287 (5th Cir. 1981); *United States* v. *Boylan*, 620 F.2d 359, 360-361 (2d Cir.), cert. denied, 449 U.S. 833 (1980); *United States* v. *Aleman*, 609 F.2d 298, 306-307 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).[15]

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[15] Liberatore incorrectly relies (83-1801 Pet. 15) on the decisions of the Fifth Circuit in *United States* v. *Marable*, 578 F.2d 151 (1978), and *United States* v. *Ruigomez*, 576 F.2d 1149 (1978), to support his double jeopardy claim. In those cases, the court addressed the propriety of charging a single continuing drug conspiracy in separate indictments, not the question whether a substantive offense for which a defendant is convicted can also constitute a predicate offense in a RICO prosecution. On the latter issue, the Fifth Circuit is in agreement with the holding of the Ninth Circuit in *Rone*. See *United States* v. *Hawkins*, 658 F.2d at 287.

Liberatore also claims that use of a bribery conspiracy charge as a predicate act in a RICO conspiracy count constitutes multiple prosecution for a single conspiracy (83-1801 Pet. 15-16). That claim is erroneous for the reasons we have stated in response to Calandra's argument concerning a RICO conspiracy prosecution based, in part, on a conspiracy to commit murder. See pages 16-18, *supra*. In any event, as Liberatore acknowledges (83-1801 Pet. 3), the sentence on his racketeering conviction runs concurrently with the sentences imposed on his bribery convictions.

2. Petitioner Licavoli contends (83-1657 Pet. 10-13) that he was prejudiced by the district court's decision not to sever his case from that of his co-defendants. He notes that Geraldine Rabinowitz, the FBI file clerk who received payments from other co-conspirators in exchange for confidential FBI information, mentioned his name during her testimony, although the district court had previously ruled that evidence of the bribery scheme (of which Licavoli had earlier been acquitted) could not be considered against him.

The court of appeals correctly noted (Pet. App. A21-A23) that the general rule in conspiracy cases is that persons indicted together should be tried together, particularly when the offense charged may be established against all the defendants by the same evidence. See, *e.g.*, *United States* v. *Russell*, 703 F.2d 1243, 1247 (11th Cir. 1983); *United States* v. *Parodi*, 703 F.2d 768, 779 (4th Cir. 1983); *United States* v. *Hamilton*, 689 F.2d 1262, 1275 (6th Cir. 1982), cert. denied, 459 U.S. 1116 (1983). That rule applies with full force when all defendants are charged in a RICO conspiracy count, even when, as here, they are not all named in connection with the same alleged predicate acts. See, *e.g.*, *United States* v. *Melton*, 689 F.2d 679, 686 (7th Cir. 1982); *United States* v. *Provenzano*, 688 F.2d 194, 199 (3d Cir.), cert. denied, 459 U.S. 1071 (1982) ("in a case of this nature, it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed"); *United States* v. *Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1319 (7th Cir.), cert. denied, 454 U.S. 1082 (1981).

The court of appeals correctly concluded that Licavoli failed to meet the "heavy burden * * * requiring a strong showing of prejudice" (*United States* v. *Davis*, 707 F.2d 880, 883 (6th Cir. 1983)) that is necessary to establish that the district court abused its discretion in denying a severance motion. Here, any potential for prejudice was reduced by the district court's redaction of the FBI

documents to remove references to Licavoli (C.A. App. 467). In addition, as the court of appeals observed (Pet. App. A22), the jury was carefully instructed that evidence of bribery was admissible only against Liberatore and Ciarcia, and there is no reason to believe that it was unable to confine its consideration of Rabinowitz's testimony to those two defendants.[16]

3. a. Following threshold determinations by the district court that petitioners had participated in a conspiracy and that statements made in furtherance of the scheme would be admissible against each of them (see Tr. 1584-1588, 2607, 2609, 2616-2617, 3108-3109), Aratari and Guiles testified about statements of Liberatore concerning the scheme. Several of the statements implicated Licavoli in the conspiracy and tended to show that he was responsible for directing the scheme. See 83-1657 Pet. 14-16. Liberatore did not testify at trial.

Licavoli maintains (83-1657 Pet. 13-18) that admission of Liberatore's out-of-court statements violated both the hearsay rule and the Sixth Amendment Confrontation Clause. This fact-bound claim was properly rejected by the court of appeals (Pet. App. A20).

Under Fed. R. Evid. 801(d)(2)(E), a statement is not hearsay if it is offered against a party and is a "statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." As Licavoli acknowledges (83-1657 Pet. 14), in order to admit statements of co-conspirators under this Rule it is necessary to show only that the defendant and the declarant were both participants in the conspiracy and that the statements in question were made in furtherance of the conspiracy. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 701 (1974); *United States* v. *James*, 590 F.2d 575, 578 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979).

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[16] The trial court repeated the cautionary instruction concerning the evidence of bribery on numerous occasions. See Tr. 15-16, 201, 460-461, 482, 500-501, 539-540, 936-937, 6529-6530; C.A. App. 531, 567, 575, 578.

The district court properly concluded that each of the prerequisites for admission of Liberatore's statements was satisfied. Evidence from other sources showed that Licavoli was instrumental in directing and financing the murder of Greene (see, *e.g.*, Tr. 1677-1680, 1714-1716, 2316-2317, 2333-2335). It also established that, in furtherance of this objective, Liberatore, acting as Licavoli's lieutenant, recruited two hit men and coordinated the efforts of two assassination teams, consisting of Ferritto, Carabbia, Aratari, and Guiles. Liberatore's statements to members of those teams were plainly in furtherance of the scheme.[17]

There is no substance to Licavoli's contention that, even if they fall within the scope of Rule 801(d)(2)(E), admission of the statements violated the Confrontation Clause of the Sixth Amendment. Satisfaction of an exception to the hearsay rule does not automatically fulfill the requirements of the Confrontation Clause. See *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970) (plurality opinion); *California* v. *Green*, 399 U.S. 149, 155 (1970). However, the courts are in general agreement that, in most instances, a statement that is admissible under Rule 801(d)(2)(E) will be sufficiently reliable to satisfy the Confrontation Clause, without regard to the declarant's availability for cross-examination. See, *e.g.*, *United States* v. *Ammar*, 714 F.2d 238, 256 (3d Cir. 1983), cert. denied, No. 83-319 (Oct. 31, 1983); *United States* v. *Lurz*, 666 F.2d 69, 81 (4th Cir. 1981), cert. denied, 455 U.S. 1005, 1136 (1982); *United States* v. *Peacock*, 654

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[17] In *United States* v. *Lawson*, 523 F.2d 804, 806 (5th Cir. 1975), on which Licavoli relies (83-1657 Pet. 16), the court noted that certain statements contained in wiretaps of telephone conversations admitted against him were made "with the knowledge of and on behalf of" the defendant. Rule 801(d)(2)(E) does not require such proof in connection with any co-conspirator statement. The court in *Lawson* was addressing the defendant's claim that there was insufficient evidence to show that he was a member of the conspiracy. Here there was ample evidence from other sources that Licavoli was a member of the conspiracy.

F.2d 339, 349 (5th Cir. 1981); *United States* v. *Nelson*, 603 F.2d 42, 46 (8th Cir. 1979); *United States* v. *Marks*, 585 F.2d 164, 170 n.5 (6th Cir. 1978); *United States* v. *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973); cf. *United States* v. *Perez*, 658 F.2d 654, 660-662 (9th Cir. 1981); *United States* v. *Wright*, 588 F.2d 31, 38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979). If the declarant is found to be a co-participant in a criminal enterprise, he has an incentive to speak truthfully in connection with matters relating to the scheme. See, *e.g.*, *United States* v. *Nelson*, 603 F.2d at 47; *United States* v. *Papia*, 560 F.2d at 836 n.3. Virtually all of Liberatore's statements at issue here concerned the mutual objective of murdering Greene and were made to the hired assassins; therefore, Liberatore had every reason to speak truthfully about Licavoli's desires.

b. Nor is there any substance to Licavoli's claims (83-1657 Pet. 5, 9-10) that the trial court erred in admitting testimony that federal agents had been instructed "to monitor only conversations dealing with criminal activity" and that it improperly vouched for the credibility of government witnesses by instructing the jury concerning the participation of those witnesses in the Department of Justice Witness Protection Program.

The testimony concerning instructions to monitor conversations dealing with criminal activity (Tr. 6017) was in response to cross-examination by the defense suggesting that FBI agents acted unlawfully by indiscriminately intercepting and monitoring Licavoli's calls (Tr. 5971-5972, 5977). Under these circumstances, it was proper for the prosecution to present testimony about the scope of the surveillance warrant and the lawful manner in which it was executed in order to refute the inference of impropriety. Cf. *United States* v. *Jackson*, 509 F.2d 499, 507-508 (D.C. Cir. 1974) (testimony about execution of search warrant properly admitted). Moreover,

the trial court's immediate and comprehensive instruction to the jury concerning this testimony obviated the possibility of prejudice.[18]

During direct examination, the government elicited from several witnesses the fact that they were participants in the Department of Justice Witness Protection Program and had received subsistence allowances and other benefits from the government (see, *e.g.*, Tr. 5043-5044). The trial court subsequently instructed the jury that "[t]hrough the U.S. Marshal Service, the Attorney General of the United States is authorized to provide for the health, safety and welfare of witnesses * * * whenever in the judgment of the Attorney General testimony from or a willingness to testify by such a witness would place his life or person or the life or person of a member of his family or household in jeopardy" (C.A. App. 536). The court cautioned the jury, however, that "any decision to place a witness under the Witness Protection Program is solely an administrative decision in which no court participated" and that such participation bears only on the credibility of the witnesses and "may not be considered as any evidence or inference of guilt as to the acts charged against any of these defendants" (*id.* at 537).

Defendants often seek to impeach witnesses by showing that they received significant benefits in connection with participation in the Witness Protection Program.[19] The

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[18] The trial court instructed the jury, inter alia (C.A. App. 1218):

> the use of the term "criminal" in the answer [to the prosecutor's question] is not to be understood by the jury as offering any evidence whatsoever with reference to any of the Defendants in this case. It is merely a characterization the witness used in connection with whatever instructions he received in this matter.

[19] Indeed, Licavoli's attorney, during cross examination of a government witness, elicited substantial testimony concerning the witness's receipt of benefits from the government in connection

government may properly anticipate such impeachment by eliciting the fact that the witness was in the program, thus avoiding an inference that it has attempted to hide his possible bias. See *United States* v. *Thevis*, 665 F.2d 616, 637 (5th Cir. 1982), cert. denied, 459 U.S. 825 (1982); *United States* v. *Ciampaglia*, 628 F.2d 632, 639-640 (1st Cir.), cert. denied, 449 U.S. 956 (1980); *United States* v. *DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979), rev'd on other grounds, 449 U.S. 117 (1980); *United States* v. *Partin*, 552 F.2d 621, 644-645 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

The trial court's instruction concerning the Witness Protection Program was similar to those approved in *Partin*, 552 F.2d at 644, and *DiFrancesco*, 604 F.2d at 775. Far from constituting a "judicial vouching" for the integrity of the decision to place the witness in the program (83-1657 Pet. 10), the instruction was a carefully balanced admonition that no court had participated in the administrative decision and that the decision could not be considered in determining the question of guilt.

4. Finally, Licavoli claims (83-1657 Pet. 19-22) that the jury instructions failed adequately to distinguish between the concepts of aiding and abetting and conspiracy. As a result, he maintains, the jury could have predicated his RICO conspiracy conviction on a determination either that he aided and abetted the murder of Greene or that he participated in the conspiracy, without determining that he participated in both predicate offenses; alternatively, he suggests that the instructions could have led to a lack of juror unanimity.

Although Licavoli has not specified the portion of the charge to which his objections are directed, presumably he refers to the instruction concerning the predicate act involving conspiracy, which stated that to show that a defendant "committed the predicate act of conspiracy to

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with the Witness Protection Program (*e.g.*, Tr. 5136-5137, 5146, 5148-5149).

murder Daniel J. Greene, the government must prove * * * that such defendant planned or aided one or more defendants or co-conspirators in planning the commission of the Greene murder" (C.A. App. 563; see also *id.* at 559). That language merely advised the jury that a defendant need not have been the sole or principal architect of the conspiratorial plan in order to be found guilty of participation in the conspiracy, but could have aided in *planning* of the murder. The instruction is fully consistent with settled principles of conspiracy law and did not in any way furnish the jury with alternative grounds on which to find Licavoli guilty. See *United States* v. *Guy*, 456 F.2d 1157, 1165 & n.4 (8th Cir.), cert. denied, 409 U.S. 896 (1972).

Moreover, the court instructed the jury that, before it could convict Licavoli, it was required to find that he had committed *both* of the predicate acts charged—conspiracy to murder and the murder itself (C.A. App. 557-558). That instruction obviated any possibility that, in reaching a verdict, the jury might have found that Licavoli committed only one predicate offense or that some jurors might have based their decisions on different predicate acts than others.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421023 559